# United States Court of Appeals for the Second Circuit



**APPENDIX** 

# 76-6018



## United States Court of Appeals

For The Second Circuit

ANDREW L. STONE and M. JEANNE STONE,

Plaintiffs-Appellants,

P/5

VS.

UNITED STATES OF AMERICA and DISTRICT DIRECTOR OF INTERNAL REVENUE, MANHATTAN DISTRICT.

Defendants-Appellees.

On Appeal From the United States District Court
Southern District of New York

FILED FILED

IPR 5 1976

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SECOND CIRCUIT

#### JOINT APPENDIX

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CIVIL HOUSET

TITLE OF CASE

## UNITED STATES DISTRICT COURT

D. C. Form No. 106 Rev.

DOCKET ENTRIES Jury demand date: For plaintiff: MACHAN, CAHHOMATUSOFF

MIDNEY L. STONE and JEMBIE STONE 136 E. 57th St., N.Y. 10022 LOTTED STATES OF AIERICA and DISTRICT DIRECTOR OF INTERNAL REVENUE MANUATTAN DISTRICT For defendant: STATISTICAL RECORD COSTS NAME OR J.S. 5 mailed x REC. Clerk J.S. 6 mailed Marshal Basis of Action: Income Tex \$7,108,861.73 Docket fee Witness fees Action arose at: Depositions

DATE	PROCEEDINGS	-
ur. 21-71	Filed Complaint and issued summons.	
Cp.4-/c	Filed summons with marshal's return. Servedon:	
	District Director, INS by E. Guedsmith on 8/22/74	
ct . 24-1	Attv. Gen., Wash., DC by certified mail#161752 on 8/22/74 4 Filed stip. and order that the time of defts. toanswer compalint	
	to Now 20 107/ Compared of defts. toanswer compalint	
DV 29-7	is ext. to Nov. 20,1974. So ordered Weinfeld, J. Filed stip. and order that the time of defts. to answer complaint	
	is ext. to Dec. 10,1974. So ordered, Weinfeld, J.	
00 11-7	Filed doste offer and	
GC.II-/	Filed dcfts. affd.t and notice of motion to dismiss, etc. ret. on:	
20 11-7	Dec.24,1974 at 2:15pm in Rm.905.	
00.11-7	4 Filed defts. memorandum of law in suport of motion to dismiss.	
ec. II-/	4 Filed defts. exhibits to affdt. and Rule9(g) statement.	
	2:15 2: - Weinfold T	
		1
13-19-75	Filed pltf's interrogatories to defts.	
14-18-75	Filed stip.and order ext. deft's time to answer until thirty days after date	-
	on which the Court files an opinion or order disposing motion to dismiss	
	Weinfeld, J.	
2-02-75	Filed pltf. first amended complaint	-
2-02-75	Filed pltfs memorandum of law in opposition to defts motion to dismiss	-
2.32.75	Filed pltfs affdyt, in opposition to motion to dismiss	-
2-02-75	Filed OPINION, 43458 The complaint is dismissed for lact of jurisdiction. The	-
	dismissal also applies to the claim alleged to be for breach of contract,	<b>一</b> 说
	since the proven few energical rendermands of the few breach of contract,	-
	since the prayer for specific perdormance of the agreement affects the asse	a.
	ment or collection of taxes. However, the dismissal of that claim is without the same of taxes.	it
	projudice to the commencement by pltfs of a new action for breach of contra	注
	against the government (not against the Dist. Director) in the sum of \$10.00	יו ביו
	or alternatively, with leave to pltfs, if so advised, to serve an ameded	10.
	complaint against the government in this action limited to a claim solely	10
	complaint against the government in this action limited to a claim solely for breach of the alleged agreement in the sum of \$10,000 - Veinfold I	10
01-16-76	complaint against the government in this action limited to a claim solely for breach of the alleged agreement in the sum of \$10.000, -Weinfeld, J.	
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1.

## FIRST AMENDED COMPLAINT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ANDREW L. STONE and M. JEANNE STONE,

Plaintiffs, :

v.

: 74 Civ. 3643 (E.W.)

UNITED STATES OF AMERICA and DISTRICT DIRECTOR ON INTERNAL REVENUE, MANHATTAN DISTRICT,

FIRST AMENDED COMPLAINT

Defendants. :

Plaintiffs, by their attorneys, WAGMAN, CANNON & MUSOFF, P.C., for their first amended complaint herein, allege as follows:

### FIRST CLAIM FOR RELIEF

- 1. Plaintiffs, Andrew L. Stone and M. Jeanne Stone, are husband and wife, citizens of the United States, and reside at 2601 South Warson Road, St. Louis, Missouri.
- 2. Defendants are the United States of America and the District Director of Internal Revenue, Manhattan District.
- 3. This is a suit arising under the Fourth and Fifth Amendments of the United States Constitution, the Internal Revenue laws of the United States, more specifically \$6013(e), 6213(a), 6861 and 6862 of the Internal Revenue Code of 1954, an escrow agreement entered into between Plaintiff Andrew L. Stone and Defendant United States of America, and the non-statutory equity jurisdiction of the District Court over

federal officials and officers administering the Internal Revenue laws.

- 4. Jurisdiction is conferred upon this Court by virtue of the Fourth and Fifth Amendments of the United States Constitution, 28 U.S.C. \$1331, 1340 and 1346(a). The matter in controversy with respect to section 1331 exceeds, exclusive of interest and costs, the sum of ten thousand dollars. Plaintiff Andrew L. Stone's claim under section 1346(a) is founded upon a contract with the Government of the United States, as hereinafter more fully appears and does not exceed \$10,000.00.
- 5. Plaintiffs timely filed joint Federal income tax returns with the District Director of Internal Revenue, Manhattan District, for each of the calendar years 1963 through 1967.
- 6. On February 7, 1972, the District Director of Internal Revenue made jeopardy assessments against the Plaintiffs, individually, for alleged unpaid income taxes in the amount of \$7,108,861.73.
- 7. Shortly after said jeopardy assessments were made, the Internal Revenue Service liened and levied against substantially all of the respective assets of the Plaintiffs.
- 8. Since 1967 Plaintiff Andrew L. Stone, among others, was the subject of intensive investigation by the United States which resulted in his indictment during 1968 in

the District of Columbia (Cr. No. 1233-68) for conspiracy, false statements and kickbacks and his indictment during 1969 in the Eastern District of Missour. (69 Cr. 52(3)) for conspiracy and violation of the Munitions Act.

- 9. In 1969, Plaintiff Andrew L. Stone pleaded guilty to certain counts of his indictment in the District of Columbia and one count of his indictment in the Eastern District of Missouri and was sentenced upon those convictions. All remaining counts in each indictment against him were dismissed.
- 10. During the pendency of the criminal actions against Plaintiff Andrew L. Stone, the United States became fully aware of the financial status of each of the Plaintiffs.
- of Plaintiff Andrew L. Stone relevant to the criminal indictments, the United States in January 1969 initiated civil actions against him, among others, for double damages under the False Claims Act, 31 U.S.C. \$231 et.seq., or, alternatively, single damages under theories of breach of contract of warranty and payment of public funds by mistake (D.C.D.C. Civil Action No. 230-69 and D.C.E.D.Mo. Civil Mo. 69C-24(2)). On July 24, 1970, in connection with these actions, Plaintiff Andrew L. Stone and the United States entered into an escrow agreement whereby Stone placed the bulk of his assets in escrow as a guaranty that there would be funds available to satisfy any final judgment or disposition of said actions.

- 12. Under the terms of the July 24, 1970 escrow agreement, income from the escrow assets inured to Stone; Stone was required to and made a full exposition of his net worth to the United States; and, as part of its undertaking in the escrow agreement, the United States agreed as follows:
  - "7. The United States agrees, that, so long as Stone shall not be in default under any of his agreements hereunder, the Civil Division of the United States Department of Justice will not institute attachment proceedings against the property and assets of Stone, and shall use its best internal efforts to dissuade any other agency of the United States from proceeding by way of attachment or other lien against the property and assets of Stone."

U.

- States broached its escrew agreement of July 24, 1970 by filing its jeopardy assessments against each of the plaintiffs in the total amount of \$7,108,861.73 and causing the escrow agent to withhold from Plaintiff Andrew L. Stone any income derived from the escrow assets although Stone at no time defaulted on any of his obligations under that agreement and has continued to fulfill and perform the agreement in all respects.
- 14. Plaintiffs have no adequate remedy at law.

  They have been stripped of their liquid assets and are unable to defend themselves against an onslaught of litigation by the United States involving millions of dollars, "and consequently face complete financial ruin.

#### SECOND CLAIM FOR RELIEF

- 15. Plaintiffs reallege paragraphs 1. through 14. of this complaint.
- and capricious manner by instituting the February 7, 1972 jeopardy assessments against each of the Plaintiffs since Defendants had at all times full knowledge of Plaintiffs' assets and Plaintiffs at no time made any attempt to mislead with respect to their assets, or to dispose of same. That Defendants' action in asserting the jeopardy assessment was patently arbitrary and capricious is apparent from the fact that Plaintiff Andrew L. Stone was then in Federal custody under a fifteen year sentence and unable to dispose, without the knowledge and approval of the prison authorities, of any assets that were not already subject to the July 24, 1970 escrow agreement.
- 17. Said arbitrary and capricious assessments were made by the Internal Revenue Service in violation of its own promulgated guidelines and as a direct consequence of unwarranted newspaper publicity which achieved prominent notice beginning the week of January 30, 1972 on a national basis with special emphasis in the Washington Post and the St. Louis Post Dispatch questioning why Plaintiff Andrew L. Stone was permitted to receive income on the escrowed assets.
- 18. \$5214.21 of the Internal Revenue Manual provides that one or more of the following conditions must

JA8 exist before a jeopardy assessment is made: "(a) The taxpayer is or appears to be designing quickly to place his property beyond the reach of the Government either by removing it from the United States, or by dissipating it. (b) The tampayer is, or appears to be designing quickly to depart from the United States, or to conceal himself. (c) The taxpayer's financial solvency is or appears to be imperiled. (This does not include cases where the taxpayer becomes insolvent by virtue of the accrual of the proposed assessment of tax, penalty and interest)." None of the foregoing requirements set forth 19. in paragraph 18 existed in Plaintiff's case. Said arbitrary and capricious assessments were made by the Internal Revenue Service to satisfy the press and to bring pressure against the then incarcerated Plaintiff Andrew L. Stone to settle the civil actions brought against him by the United States, rather than to safeguard any revenue that might be due and owing. THIRD CLAIM FOR RELIFF 21. Plaintiffs reallege paragraphs 1. through 40. of this complaint. 22. Said arbitrary and capricious assessments were made by the Internal Revenue Service in violation of the Plaintiffs' rights against illegal seizure under the Fourth Amendment of the Constitution of the United States.

23. Said arbitrary and caprolous assessments were made by the Internal Revenue Service in violation of the Plaintiffs' due process rights under the Fifth Amendment of the Constitution of the United States.

## FOURTH CLAIM FOR RELIEF

- 24. Plaintiffs reallege paragraphs 1. through 20. of this complaint.
- 25. The computations of tax underlying the jeopardy assessments made against each of the plaintiffs on February 7, 1972 are arbitrary and capricious in that they are based in substantial part upon determinations by the Commissioner of Internal Revenue that plaintiffs received income which the Commissioner knew or should have known plaintiffs did not receive and which very income in fact was attributed by the Commissioner to another taxpayer, one Francis N. Rosenbaum.
- 26. Said arbitrary and capricious computations of tax were made by the Internal Revenue Service in violation of the Plaintiffs' due process rights under the Fifth Amendment of the Constitution of the United States.

## FIFTH CLAIM FOR RELIEF

27. Plaintiff M. Jeanne Stone reallegen paragraphs 1. through 10. of this complaint.

- 28. All omissions of income seeming the basis of the computations of tax underlying the jeopardy assessments made against each of the Plaintiffs on February 7, 1972 have been attributed by the Commissioner of Internal Revenue to plaintiff Andrew L. Stone.
- 29. Plaintiff M. Jeanne Stone has been determined by the Commissioner of Internal Revenue to be liable for said computations of tax only because she was a signatory to the joint income tax returns involved and not because of any acts of commission or omission on her part.
- 30. The Commissioner of Internal Revenue conceded that Plaintiff M. Jeanne Stone is not liable for the fraud addition to the tax (26 U.S.C. sec. 6653(b) for the years underlying the jeopardy assessments.
- 31. Plaintiff M. Jeanne Stone had no knowledge of her husband's alleged omissions of income for the periods involved herein.
- 32. Plaintiff M. Jeanne Stone did not significantly benefit directly or indirectly from the alleged omissions of income forming the basis of the Internal Revenue Service's computations of tax.
- 33. None of Plaintiff M. Jeanne Stone's assets
  liened and levied upon as a result of the jeopardy assessments
  emanated from any of the alleged omissions of income attributed
  to her husband.

- 34. Plaintiff M. Jeanne Stone is entitled to relief under the provisions of 26 U.S.C. \$6013(e).
- 35. Because of the arbitrary and capricious computations and assessments of tax against the Plaintiffs, and the fact that Plaintiff M. Jeanne Stone is an innocent spouse under 26 U.S.C. §6013(e), the Defendants can under no circumstances prevail in said assessments against the Plaintiffs.

WHEREFORE, Plaintiffs demand judgment against defendants, jointly and severally, as follows:

- (a) Under the First Claim for Relief, judgment for Plaintiff Andrew L. Stone in the amount of \$10,000.00, together with interest and costs for breach of contract and that Defendant United States of America be required to specifically perform its written agreement entered into with said plaintiff.
- (b) Under the Second Claim for Relief, that Defendants and any agency or employee thereof be enjoined from in any way collecting upon or seeking to enforce by lien, levy or otherwise the jeopardy income tax assessments of February 7, 1972 against Plaintiffs;
- (c) Alternatively, under the Third Claim for Relief, that requested by paragraph (b) of the prayer herein;
- (d) Alternatively, under the Fourth Claim for Relief, that requested by paragraph (b) of the

JA12

prayer herein;

- (e) Alternatively, under the Fifth claim for relief, that Defendants and any agency or employee thereof be enjoined from in any way collecting upon or seeking to enforce by lien, levy or otherwise the jeopardy income tax assessment of February 7, 1972 against Plaintiff M. Jeanna Stone;
- (f) That Defendants be taxed all applicable costs of this action; and
- (g) That Plaintiffs be granted such other and further relief as the Court may deem just, equitable and proper.

Respectfully submitted,

WAGMAN, CAMMON & MUSOFF, P.C.

WALLACE MUSOFF

Office & P.O. Address

136 East 57th Street

New York, N.Y. 10022 Tel. (212) 753-2900

Dated: New York, N.Y. January 15, 1975 UG3:eb 74-2677

## DEFENDANTS STATEMENT PURSUANT TO RULE 9(g)

UNITED STATES DISTRICE COURT

SOUTHERN DISTRICT OF YORK

ANDRESS C. STONE and M. JESSEZ STON.,

Plant ffs,

74 Ctv. 36-3 (ED)

UNITED STATES OF AMERIC and DISTRICT DIRECTOR OF ALL STAL REVENUE, MANUATTAN DISTRICT,

Defendants.

#### DEFENDANTS' STATEMENT PUR WANT TO RULL 9(g)

Pursuant to Rule 9(g) of the General Rules of this Court, defendants, United States of America and District Director of Internal Revenue, Manhattan District, contend that there are no genuine Issues to be tried as to the following material facts:

1. Defendants respectfully incorporate herein by reference the facts contained in the annexed afridavit of William G. Ballaine, sworn to December 10, 1974, and Exhibits attached thereto.

Dated: New York, New York

December II , 1974

Respectfully submitted,

FAUL J. CURMAN United States Attorney for the Southern District of New York Attorney for Defendants

By: William I. Ballaine
WILLIAM G. BALLAINE
Assistant United States Attorney

Assistant United States Attorney Office and Post Office Address: United States Courthouse Folcy Square New York, New York 10007(791-196)

BEST COPY AVAILABLE

WGB: iw
74-2677

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDREW L. STONE and M. JEANNE STONE, : AFFIDAVIT IN SUPPORT OF

Plaintiffs, : MOTION TO DISHISS

- v - : 74 Civ. 3643 (EW)

UNITED STATES OF AMERICA and DISTRICT DIRECTOR OF INTERNAL REVENUE, MANHATTAN DISTRICT,

Defendants.

COUNTY OF NEW YORK : 'ss.:
SOUTHERN DISTRICT OF NEW YORK )

WILLIAM G. BALLAINE, being duly sworn, deposes and says:

- 1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, attorney for defendants in this action. As such, I am familiar with the matters contained in this affidavit. Prior to preparing this affidavit, I received copies of Government documents pertinent to this action and court papers relating to plaintiffs' actions in U. S. Tax Court and both civil and criminal proceedings by the United States against Andrew Stone and others in Federal District Courts.
- 2. I make this affidavit in support of defendants' motion, pursuant to Rule 12(b)(2) and (6) of the Federal Rules of Civil Procedure, to dismiss plaintiffs' complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

WGB: 1w 74-2677

- 3. Plaintiffs in this action are Andrew L. Stone and his wife, M. Jeanne Stone. In 1968, Andrew L. Stone, together with others, was indicted in the United States
  District Court for the District of Columbia (Cr No. 1233-68) for one count of conspiracy to defraud the United States of America from on or about January 1, 1963 through February 1, 1967 and for twenty-nine substantive counts of fraud and illegal kickbacks. A photocopy of said indictment is attached hereto as Exhibit A.
- 4. I have been informed by Lawrence Lippe, a trial attorney in the Frauds Section, Civil Division, United States Department of Justice, that Andrew Stone pleaded guilty to Count 1 of this indictment, the conspiracy count, and to Counts 3, 7, 8-11, 15 and 16. Should there be any question as to the complete accuracy of this information, this office will obtain court records to document the precise counts to which Mr. Stone pleaded guilty.
- 5. In 1969, Andrew Stone, together with others, was also indicted in the United States District Court for the Eastern District of Missouri (69 Cr 52(3)) for one count of conspiracy to violate the Mutual Security Act of 1954, 22 U.S.C. §1934, from on or about January 1, 1961 through January 1, 1969, and sixteen substantive counts of violations of said Act. A photocopy of said indictment is attached hereto as Exhibit B.
- 6. I have been informed by Mr. Lippe that Andrew Stone pleaded guilty to one count of this indictment. Agaia, if there is doubt as to the accuracy of this information, this office will obtain appropriate court records.

- In 1969, the United States of America commenced a civil damage action against Andrew Stone in the United States District Court for the Eastern District of Missouri (Civ. No. 69C-24(2)). For its F irst Amended Complaint in this action, the United States asserts five claims against defendants Stone, Chromcraft Corporation and its successor, Alsco Incorporated, jointly and severally, for violation of the False Claims Act, breach of warranty, recoupment of public funds paid by mistake, violation of the Anti-Kickback Act and declaration of a constructive trust. As relief, the Government requests, among other things, single damages exceeding \$6 million for breach of warranty and double that sum for violation of the False Claims Act. A photocopy of the First Amended Complaint and the Answer of Andrew L. Stone thereto are attached hereto and collectively marked Exhibit
- 8. I am informed by Mr. Lippe that the United
  States of America has commenced substantially the same civil
  damage action against Andrew Stone in the United States
  District Court for the District of Columbia. Mr. Lippe is the
  attorney with substantial responsibility for representing the
  United States both in this action and the civil action in the
  United States District Court for the Eastern District of
  Missouri.
- 9. On July 24, 1970, Andrew Stone entered into an escrow agreement with the United States which, according to the recitals, was to assure the United States that sufficient

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assets of Stone would be available to satisfy any judgment JA17 or disposition of the Government's civil damage actions and to avoid the institution of attachment proceedings by the United States against Stone in connection with these actions. A photocopy of this escrow agreement, which sets forth the assets placed into escrow and the escrow agent's authority to invest and reinvest and to deposit to Stone's account certain interest and dividends, is attached hereto as Exhibit D.

- States, there are a number of other actions by the United States, there are a number of other actions instituted by private parties against Andrew Stone and others all arising out of Stone's allegedly fraudulent activities. In 1971, the Judicial Panel on Multidistrict Litigation ordered that the Government's two civil actions and four other civil actions (including Harvard Indus., Inc. v. Republic Electronic Indus., Inc., 70 Civ. 1113 (S.D.N.Y.)) be transferred to the District of Columbia for coordinated and consolidated pretrial proceedings. The consolidated actions were assigned to the Honorable Charles R. Weiner for such pretrial proceedings. The order of the Panel may be found in In re Alsco-Harvard Fraud Litigation, 325 F. Supp. 315 (1971).
- 11. The actions consolidated by the Panel are not the only other civil actions against Andrew Stone. According to a 1973 memorandum of law submitted to Judge Weiner by the law firm of Williams, Connolly & Califano, then attorneys for Stone, in support of a motion to withdraw, there are a number of other pending civil actions involving Stone, including four stockholder derivative actions in various state

randum of law of Williams, Connolly & Califano is attached hereto as Exhibit E.

ments were made against Andrew L. Stone and M. Jeanne Stone for income tax deficiencies, plus additions, for tax years 1963 through 1967. The total assessments were \$7,108,861.63. By statutory notice dated April 6, 1972, issued from the office of the District Director, Manhattan District, Andrew Stone and Jeanne Stone were advised of the deficiencies and additions determined. Attached to the notice was a schedule detailing the computation of the deficiencies and additions. A photocopy of the statutory notice, dated April 6, 1972, is attached hereto as Exhibit F.

Stone each filed a petition in United States Tax Court seeking a redetermination of the deficiencies and additions assessed.

Among other things, Jeanne Stone contends in her petition that she is an "innocent spouse" under 26 U.S.C. §6013(e).

Issue has been joined in these actions and they are still pending. Photocopies of the pleadings in both Tax Court actions are attached hereto and collectively marked Exhibit G.

14. According to court papers in affiant's possession, Andrew Stone thereafter made a motion before the Honorable Charles R. Weiner in the consolidated pretrial proceedings entitled Alsco-Harvard Fraud Litigation, to dismiss the civil complaint of the United States or to stay all proceedings in the consolidated actions pending completion of

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> the Stones' Tax Court actions. Stone's legal counsel also moved to withdraw as counsel. Apparently underlying these motions was the contention that action by the Internal Revenue Service to enforce its jeopardy assessments had prevented Stone from having funds necessary to retain competent legal counsel and accounting services for his civil defense or to pay for pre-trial discovery costs. In particular, Stone objected to Internal Revenue Service actions because they apparently resulted in the refusal of the escrow agent under the 1970 escrow agreement to release to Stone income from the escrow assets. Stone contended that the Government's action was arbitrary (in excess of the authority under 26 U.S.C. §6861(a) and Rev. Proc. 60-4, 1960-1 Cum. Bull. 877) and violated his constitutional rights. The arguments raised in support of the motion appear to be substantially the same as the contentions set forth in plaintiffs' complaint in this action. Stone requested that evidence be taken as to whether the Civil Division, Department of Justice, had complied with the escrow agreement and whether the jeopardy assessments had been made solely for legitimate revenue purposes and within the District Director's discretion. A photocopy of the pertinent extracts of Stone's motions are attached hereto as Exhibit H. In an opinion dated January 8, 1974, Judge Weiner denied all motions. A photocopy of the memorandum opinion is attached hereto as Exhibit I.

15. Stone and his counsel each immediately moved for reconsideration. The Court held a hearing on July 2.

1974 primarily on the motion of Stone's legal counsel to withdraw. During this hearing, testimony was taken of

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Andrew Stone as to his assets at that time. This office has a photocopy of that portion of the transcript of this hearing in which Andrew Stone gives testimony and will provide it to the Court or plaintiffs if desired. On July 31, 1974 Judge Weiner reaffirmed his prior decision as respects. Stone's motions but permitted Stone's legal counsel to withdraw from the action. A photocopy of the opinion and order is attached hereto as Exhibit J.

16. In October 19/4, Andrew Stone, now apparently acting pro se, again moved to dismiss the Government's complaint in the consolidated proceedings. He advised Judge Weiner that he had filed suit in the United States District Court for the Southern District of New York to vacate the jeopardy assessments (the instant action) and, as an alternative to dismissal of the complaint, asked that there be a stay of proceedings until the Internal Revenue Service permits Stone sufficient funds to continue with the defense of the action, until completion of the Tax Court actions, or until the jeopardy assessments are vacated by this Court. He also asked for an evidentiary hearing on the constitutional issue. Assuming denial of all the foregoing, Stone asked for leave to appeal under 28 U.S.C. §1292(b). A photocopy of pertinent extracts from this motion is attached hereto as Exhibit K.

17. For the reasons set forth in defendants' memorandum of law in support of their motion, affiant respectfully submits that plaintiffs' complaint in this action should be dismissed, pursuant to Rule 12(b)(2) and (6) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

. - BEST COPY AVAILABLE

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WHEREFORE, affiant prays that defendants' motion to dismiss the complaint should in all respects be granted.

Assistant United States Attorney

Sworn to before me this

10th day of December, 1974.

WALTER G. BRANNON Notary Public, State of New York No. 24-0394500 Qualified in Kings County Cert. filed in New York County Term Expires March 30, 1975

#### INDICTMENT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

#### Holding 'a Criminal Term

Special April Grand Jury Sworn in on April 1, 1968

THE UNITED STATES OF AMERICA

: Criminal No. 1233-68

ANDREW L. STONE
FRANCIS N. ROSENBAUM
EVELYN R. PRICE
ROBERT B. BREGMAN
CHROMCRAFT CORPORATION
AND ITS SUCCESSOR ALSCO. INC.

Violations: 18 USC 2 18 USC 371 18 USC 1001

41 USC 54

The Grand Jury charges:

## G - COUNT ONE

- 1) At all times material herein the Department of the Navy, a Department and Agency of the United States of America, was responsible for the procurement of 2.75 inch rocket launchers for the national defense program.
- CRAFT CORPORATION, a Missouri corporation, and its successor defendant ALSCO, INCORPORATED, a Delaware corporation, each of which is hereinafter referred to as CHROMCRAFT, was the supplier of 2.75 inch rocket launchers to the Department of the Navy as a prime contractor under the following negotiated firm fixed price contracts, including all change orders, amendments and modifications pertaining thereto:

CON	TRACT		EFFECTIVE DATE	THUUMA
a)	NOW	62-0638f	February 5, 1962	\$2,480,450.00
b)	NOw	64-0035f	July 12, 1963	618,021.00
c)	NOw	64-01541	October 25, 1963	1,775,290.00
d)	мом	64-0190£	December 9, 1963	505,393.00

DOMINIOT .			EFFECTIVE DATE	AMOUNT	
	e)	NOW	64-0313r	February 14, 1964	\$ 1,904,125.00
	f)	NOw	64-0609f	June 3, 1964	2,822,105.00
	g)	NOw	64-06891	June 25, 1964	1,684,514.00
	h)	NOW	65-0121f	September 1, 1964	3,437,979.00
	1)	NOw	65-04721	May 11, 1965	197,828.00
	j)	NOW	65-0547f	May 3, 1965	12,018,225.00
1	k)	NOw	66-00821	August 10, 1965	5,191,711.00
	l)	NOw	66-0307£	January 4, 1966	1,150,503.00
	m)	NOw	66-0435f	April 5, 1966	4,797,000.00
	n)	N000	19-670-01	20f January 24, 1967	8,588,325.00
	each			acts was entered into	
	dire	ection	of the Sec	cretary of the Navy.	- J - L minder the

- 3) At all times material herein defendant ANDREW L. STONE was the principal stockholder, the chief executive officer, the chief fiscal officer and a director of CHROMCRAFT.
- 4) At all times material herein defendant FRANCIS N. ROSENBAUM maintained an office at 824 Connecticut Avenue, N. W., in the District of Columbia, was a director of CHROMCRAFT and its special counsel.
- 5) At all times material herein defendant EVELYN R. PRICE was executive secretary to defendant Andrew L. Stone.
- 6) At all times material herein defendant ROBERT B. BREGMAN was the president and the sole stockholder of Bregman Electronics, Inc., with an office at 25 West 43rd Street, New York, New York.
- 7) At all times material herein HANS SENN also known as JOHANN SENN was an officer and a director of THE BANK FUR HANDEL und EFFEKTEN (Bank for Commerce and Securities). Zurich, Switzerland.

- 3 -JA24

- 8) At all times material herein WALTER A. LIPS was Vice-Director of the Union Bank of Switzerland (also known as the Schweizerische Bankgelsellschaft) Branch at Aarau, Switzerland.
- 9) At all times materal herein Scientific Electronics, Limited, was a California corporation with a listed address at 144 South Beverly Hills Drive, Beverly Hills, California.
- 10) At all times material herein Western Molded Fibre Products, Inc., of Gardena, California, was a California corporation which sold fairings to CHROMCRAFT under each of the hereinabove described contracts as a subcontractor as that term is defined in Section 52, Title 41, United States Code.
- ll) Prior to the award of each of the hereinabove describ contracts the Department of the Navy issued a Request For Proposals, in response to which CHROMCRAFT submitted cost and price data on Department of Defense Forms (DD 633).
- 12) The aforementioned cost and price data purported to reflect, among other things:
  - a) The costs and prices which CHROMCRAFT had incurred and experienced and expected to incur and experience for direct material; and
  - b) Proposed general and administrative expenses and also allowances for profits under the hereinabove described contracts.

- described contracts, in accordance with the provisions of Section 2306(f) of Title 10, United States Code, CHRONCRAFT submitted to the Department of the Navy, in the District of Columbia, Certificates of Current Cost or Pricing Data', which documents certified that the aforesaid cost and price data was accurate, complete and current as of the date of their execution.
  - 14) During and for the purpose of the negotiation of each and all of the hereinabove described contracts

    ANDREW L. STONE met with representatives of the Department of the Navy, in the District of Columbia, as the representative of CHROMCRAFT.
- contracts expressly provided that CHROMCRAFT, as the prime contractor, was itself subject to and would include in all subcontracts, as that term is defined in Section 1213(3), Title 50, United States Code Appendix, provisions in accordance with and as required by Section 1214, Title 50, United States Code Appendix. (The Renegotiation Act of 1951, as amended)
- 16) Each and all of the hereinabove described contracts contained a 'Price Reduction for Defective Cost or Pricing Data" clause pursuant to the requirements of Section 2306(f) of Title 10, United States Code.
- Board was an agency of the United States of America charged with the responsibility to ascertain, determine, recoup, and eliminate excessive profits derived from contracts made with the United States, and from related subcontracts, for the procurement of property, processes and services under the national defense program.

- ously thereafter through February 1, 1967, the exact dates being unknown, in the District of Columbia and elsewhere, ANDREW L. STONE, FRANCIS N. ROSENBAUM, EVELYN R. PRICE, ROBERT B. BREGMAN and CHROMCRAFT who are the defendants herein, and HANS SENN, WALTER A. LIPS and THE BANK FUR HANDEL, und EFFEKTEN who are named herein as co-conspirators but not as defendants, unlawfully, willfully and knowingly did agree, combine, conspire and confederate among themselves and each with the other, and with other persons whose names are presently to the Grand Jury unknown, to defraud the United States of America, that is to say the said defendants and co-conspirators did agree, combine, confederate and conspire:
- (a) To hamper, hinder, frustrate, defeat, impair and impede by craft, trickery, deceit and dishonest means including false, fictitious and fraudulent statements and representations, concealments of material facts and kickbacks, the lawful and legitimate functions, operations and purpose of
  - (1) the Department of the Navy in all phases of its negotiation for and the administration of contracts awarded to CHROMCRAFT for the procurement of rocket launchers under the hereinabove mentioned contracts and;
  - (2) the Renegotiation Board to ascertain,
    determine, recoup and eliminate excessive
    profits derived under the hereinabove
    specified contracts.

- DEFENDANTS would and did on or about March 4, 1963 cause Scientific Electronics, Limited, to be formed and on or about June 7, 1965 cause Bregman Electronics, Inc. to be formed, each of which would be and was at all times material herein a dummy corporation subject to the direction, control and use by the DEFENDANTS as a conduit for the diversion of monies fraudulently obtained.
- 20). It was further a part of said conspiracy that the DEFENDANTS would and did falsely and fraudulently represent and state that Scientific Electronics, Limited and Bregman Electronics, Incorporated were Chromcraft subcontractors which would supply or had supplied among others the following items for the hereinabove described contracts, namely:
  - a) R.F. Filter Assembly
  - b) Intervalometer Assembly
  - c) Jumper Cable (Cord) Assembly
  - d) Leadwire Harness Assembly
  - e) Package Post Assembly
  - f) Receptacle Assembly
  - 3) Special Intervalometer Assembly
  - h) Plug Threaded . Dust Center
  - i) Ground Button
  - Package Operational Manual
- 21) It was further a part of said conspiracy that the DEFENDANTS would and did prepare and cause to be prepared CHROMCRAFT purchase orders to and corresponding and related invoices and quotations from Scientific Electronics, Limited and Bregman Electronics, Inc., which purchase orders, invoices and quotations would be and were false, fictitious and fraudulent in that CHROMCRAFT would not and did not purchase nor

Electronics, Inc. the items reflected therein nor would or did CHRONORAFT purchase or acquire the items therein reflected at a cost or price as great at that reflected in the said documents.

- the DEPENDANTS would and did incorporate in the aforesaid Department of Defense Forms ED 633 the prices and costs reflected in the above described false, fictitious and fraudulent purchase orders, invoices and quotations and further that they would and did falsely and fraudulently state and represent that the prices and tosts reflected therein represented the prices and costs which had been or would be experienced and incurred by CHROMORAFT in purchasing the hereinabove described items.
- 23) It was further a part of said conspiracy that the DEFENDANTS would and did falsely certify and cause to be falsely certified in the hereinabove described Certificates of Current Cost or Pricing Data that the prices and costs reflected on the above described false, fictitious and fraudulent invoices, quotations and purchase orders were accurate, complete and current as of the date of execution.
- 24) It was further a part of said conspiracy that the DEFENDANTS would and did submit and cause to be submitted to the Department of the Navy for payment invoices incorporating claims based upon the aforesaid false, fictitious and fraudulent purchase orders, invoices and quotations.
- 25) It was further a part of said conspiracy that the DEFENDANTS would and did divert and cause to be diverted to the personal use, gain and benefit of the DEFENDANTS money paid by the Department of the Navy under the hereinabove described contracts contrary to and in defogation of the

purposes and intent of the national defense program and the Renegotiation Act of 1951, as amended, as follows:

- a) It was further a part of said conspiracy chat the DEFENDANTS would and did pay and cause to be paid the above described false, fictitious and fraudulent invoices purportedly received from Scientific Electronics, Limited and Bregman Electronics, Inc.
- b) It was further a part of said conspiracy that the DEFENDANTS would and 6'd prepare and cause to be prepared false and fictitious invoices bearing the following foreign names and addresses:

#### NAME

- a) Geaj
- b) Elpag, A.G.
- c) Alwatra, A.G.
- d) Etablissement Macoba
- e) Infina, A.G.

#### ADDRESS

Chur, Switzerland

Chur, Switzerland

Zurich, Switzerland

Vaduz, Lichtenstein

Zurich, Switzerland

which false and fictitious invoices would be and were paid from funds received by Scientific Electronics, Limited and Bregman Electronics, Inc. in payment of the false and fictitious invoices described in sub paragraph (a) of this paragraph.

c) It was further a part of said conspiracy that the DEFENDANTS well knowing that their interest in accounts in Swiss banks could and would be disguised and concealed by the co-conspirators MANS SENN, THE BANK FUR HANDEL und EFFEKTEN and WALTER A. LIPS would and did cause to be paid the foreign invoices, described in the preceding paragraph and did transmit and caused to be transmitted checks in payment of same to the aforesaid WALTER A. LIPS at the Union Bank of Switzerland and HANS SENN at THE BANK FUR HAMDEL und EFFEKTEN who would and did cause the seid checks to be

negotiated for the personal use, Jain, and benefit of the defendants.

the DEFENDANTS using Scientific Electronics, Limited as a conduit, would and did from July 1, 1963 to July 22, 1965 by the fraudulent manner and means described in paragraphs twenty-five (a), (b) and (c) above cause to be negotiated through the use of the facilities of the aforesaid Union Bank of Switzerland and THE BANK FUR HANDEL und EFFEKTEN Two Million, Two Hundred and Twenty-Seven Thousand, Five Hundred and Ninety-Two Dollars and thirteen cents (\$2,227,592.13).

27) It was further a part of said conspiracy that the DEFENDANTS using Bregman Electronics, Inc. as a conduit, would and did from September 27, 1955 to March 1, 1966 by the fraudulent manner and means described in paragraphs twenty-five (a), (b) and (c) cause to be negotiated through the use of the aforesaid facilities of THE BANK FUR HANDEL und EFFEKTEM up additional One Million, One Hundred and Eighty Thousand, Six Hundred and Minety-Two Dollars and ten dents (\$1,180,692.10).

that the DEFENDANTS ANDREW L. STONE and FRANCIS N. ROSENBAUM would and did cause Western Molded Fibre Products, Inc. to pay prohibited kickbacks to them of Six Hundred and Sixty-Three Thousand, Four Hundred and Eighty-One Dollars and five cents (\$663,481.05) by means of checks drawn against the account of WESTERN MOLDED FIBRE PRODUCTS, INC. payable to the following foreign payees.

#### MAME

- a) Geag
- b) Orma-Commerce
- c) Export Techniko
- d) Abintra A.G.
- e) Enablianoment, bacoba

the DEFEIDANTS in order to facilitate and conceal the kick-backs immediately bereinabove described would and did propare and cause to be prepared foreign invoices, bearing the names of the payees described in paragraph twenty-eight, which invoices the DEFEIDANTS well knew would be and were false, fictitious and fraudulent in that the material described therein would not be and was not delivered to or for the account of WESTERNI MOLDED FIERE PRODUCTS, INC.

the DEFENDANTS would and did make and cause to be made false, fictitious and fraudulent statements and representations of material fact in annual reports on Form RB-1 submitted to the Renegotiation Foard by CHROMCRAFT, to wit that the "total cost and expense" arising from and incident to the renegotiable business of CHROMCRAFT for and during the hereinafter specified periods was:

	AMOUNT	PERIOD
1)	\$ 7,623,368	January-December, 1963
2)	14,540,465	January-December, 1964
3)	16,530,025	January-December, 1965
4)	16,731,022	January-May, 1966

and would and utd conceal and cause to be concealed the material fact that Scientific Electronics, Limited and Bregman Electronics, Inc. were shams subject to the direction and control of the DEFENDANTS.

In furtherance of the aforesaid conspiracy and in order to effect the objects thereof the DEFENDANTS did commit, among others, the following over acts in the District of Columbia and at divers other places.

#### OVERT ACTS

- the acts set forth in the succeeding counts of this indictable on the dates, at the placer and in the manner therein set forth, all of which are incorporated herein by reference as though fully set forth and made a part hereof.
- 2) On or about January 28, 1963 ANDREW L. STONE and FRANCIS N. ROSENBAUM traveled to Los Angeles, California and met with Leon Schwartz.
- 3) On or about March 1, 1963, FRANCIS N. ROSENRAUM caused CT Corporation to form Scientific Electronics, Limited.
- 4) On or about April 29, 1963 ANDREW L. STOME dictated a letter and caused it to be delivered to Leon Schwartz.
- 5) On or about May 18, 1963, FRANCIS N. ROSENBAUM wrote a letter to Leon Schwartz.
- 6) On or about November 20, 1963, EVELYN R. PRICE wrote a letter to Leon Schwartz.
- 7) On or about September 9, 1964, EVELYN R. PRICE wrote a letter to Leon Schwartz, a carbon copy of which was prepared for and sent to FRANCIS N. ROSENBAUM.
- 8) On or about February 8, 1965, FRANCIS N. ROSENBAUL! dictated a letter which he caused to be delivered to Leon Schwartz.
- 9) On or about January 19, 1965, EVELYN R. PRICE wrote a letter to Leon Schwartz, a carbon copy of which was prepared for and sent to FRANCIS N. ROSEMBAUM.
- paid an advance of \$10,000 to ROBERT B. BREGMAN.
- 11) On or about February 24, 1966, FRANCIS N.
  ROSENBAUM facilitated the opening of the (ROBERT B.) EMEGRAN
  Electronics, Inc. bank account at the Marine Midland Grane
  Trust Company.

(In violation of 18 U.S.C. 371)

## NTS TWO THROUGH THIRTEEN

- and effect as though fully set forth at length herein, all of the allegations of paragraphs One through Six and Eleven through Sixteen of Count One of this indictment.
- On or about the dates hereinafter set forth in the District of Columbia the DEFENDANTS ANDREW L. STONE, FRANCIS N. ROSENBAUM, EVELYN R. PRICE, ROBERT B. BREGMAN, and CHROMCRAFT in a matter within the jurisdiction of the Department of the Navy, unlawfully, knowingly and willf lly did make and cause to be made false, fictitious and fraudulent statements and representations of material facts, that is to say the DEFENDANTS did submit and cause to be submitted to the Department of the Navy in Washington, D.C. the hereinbelow described "Certificates of Current Cost or Pricing Data" as required pursuant to Section 2306(f), Title 10, United States Code in which Certificates le DEFENDANTS did state and represent and cause to be stated and represented that the cost and price data referred to therein was accurate, complete and current as of the date of execution, whereas in truth and in fact as the defendants then and there well knew said cost and price data was inaccurate, incomplete and noncurrent as of the date of execution.

	COUNT	CERTIFICATE	CONTRACT
	2.	October 10, 1963	Now 64-0154f
G-	3.	October 22, 1963	Now 64-0190f
	4.	November 18, 1963	NOW 64-0313f
	5.	May 23, 1964	Now 64-0609f
	6.	June 22, 1964	Now 64 :89f
C -	-7.	August 24, 1964	NOW 65-01.21f

	COUNT	DATE OF CERTIFICATE	CONTRACT
6	(8.	March 1, 1965	Now 65-04721
	<b>)</b> 9.	April 16, 1965	NOW 65-05471
	710.	July 30, 1965	Now 65-0082r
	(11.	December 13, 1965	NOW 66-03071
	15.	March 24, 1966	NOW 66-0/351
	13.	January 13, 1967	N000 19-67-c0120f

(In Violation of 13 U.S.C. 1001; 2)

## COUNTS FOURTEEN THROUGH SEVENTEEN

- 1) The Grand Jury realleges with the same force and effect as though set forth at length herein all of the allegations of paragraphs one through Six and Eleven through Seventeen of Count One of this indictment.
- 2) On or about the dates hereinafter set forth in the District of Columbia the DEFENDANTS, ANDREW L. STONE, FRANCIS N. ROSENBAUM, EVELYN R. PRICE, ROBERT B. BREGMAN, and CHRONCRAFT in a matter within the jurisdiction of the Renegotiation Board, unlawfully, knowingly and willfully did make and cause to be made false, fictitious and fraudulent statements and representations of material facts, that is to say the DEFENDANTS did submit and cause to be submitted to the Renegotiation Board in Washington, D.C. the hereinbelow described reports on Forms RB-1 as required pursuant to Section 1215(e), Title 50, United States Code Appendix in which reports the DEFENDANTS did state and represent and cause to be stated and represented as the total cost and expense incurred by CHROMCRAFT in conducting and engaging in

renegotiable business during the particular period to which each report pertained, the sums hereinbelow set forth whereas in truth and fact as the DEFENDANTS then and there well knew each of the Forms RB-1 submitted included and reflected a total cost and expense which CHROMCRAFT had not, in fact, incurred and experienced.

	COOM	T DATE (RB-I FILED)	TOTAL COST AND E	KPENSE
	14.	April 29, 1964	\$ 7,623,368.00	
6	15.	June 2, 1965	14,548,465.00	
G	26.	April 28, 1966	16,530,025.00	
	17.	December 27, 1966	14,731,822.00	-
	(In	violation of 18 U.S.C. 1001:	: 2)	

## COUNTS EIGHTEEN THROUGH TWENTY-ONE

- 1) The Grand Jury realleges with the same force and effect as though set forth at length herein all of the allegations of paragraphs One through Six and Eleven through Seventeen of Count One of this indictment.
- 2) On or about the dates hereinafter set forth in 'the District of Columbia the DEFENDANTS ANDREW L. STONE, FRANCIS N. ROSENBAUM, EVELYN R. PRICE, ROBERT B. EREGMAN, and CHROMCRAFT in a matter within the jurisdiction of the Renegotiation Board, unlawfully, knowingly and willfully did conceal and cause to be concealed material facts, that is to say the DEFENDANTS did submit and cause to be submitted to the Renegotiation Board in Washington, D.C. the hereinbelow described reports on Forms RB-1 as required pursuant to Section 1215(e), Title 50, United States Code Appendix in which reports the DEFENDANTS were required to state each and

all subsidiaries, affiliated companies or organizations, contractors and all others under common control with or under the common control of CHROMCRAFT but the DEFENDANTS did omit to state and did cause to be omitted the material fact that Scientific Electronics, Limited and Bregman Electronics, Incorporated each was under the control of and under common control with CHROMCRAFT.

COUNT	DATE (RB-1 FILED)	PERIOD COVERED BY RB-1
18.	April 29, 1964	January 1 - December 31, 1963
19.	June 2, 1965	January 1 - December 31, 1964
20.	April 28, 1966	January 1 - December 31, 1965
21.	December 27, 1966	January 1 - May 31, 1966.

(In violation of 18 U.S.C. 1001; 2)

## COUNTS TWENTY-TWO THROUGH THIRTY

- 1) The Grand Jury realleges with the same force and effect as though fully set forth at length herein all of the allegations of paragraphs One through Six and Ten through Sixteen of Count One of this indictment.
- 2) At all times material herein CHROMCRAFT was a prime contractor holding negotiated contracts entered into by the Department of the Navy as more particularly set forth in paragraph Two of Count One of this indictment.
- 3) At all times material herein ANDREW L. STONE and FRANCIS N. ROSENBAUM each was an officer, agent and employee of CHROMORAFT.

- 4) WESTERN MOLDED FIBRE PRODUCTS, INC. was a subcontractor, as that term is used and defined in Section 52, Title 41, United States Code, under each of the aforementioned contracts set forth in paragraph Two of Count One of this indictment.
- the DEFENDANTS ANDREW L. STONE and FRANCIS N. ROSENBAUM, in the District of Columbia, did knowingly and unlawfully receive directly and indirectly from Western Molded Fibre Products, Inc. the sums hereinafter set forth in the form of a check of Western Molded Fibre Products, Inc. payable to the payees hereinafter described, said sums being a fee, commission, compensation, gift and gratuity paid on behalf of a subcontractor, namely Western Molded Fibre Products, Inc., as an inducement for the award of subcontracts and orders by CHROMCRAFT to said subcontractor and as an acknowledgement of subcontracts and orders previously awarded to said subcontractor, each and all of which orders and subcontracts related to the contracts hereinabove described in paragraph Two of Count One of this indictment.

COUNT	DATE	CHECK NO.	AMOUNT	PAYEE
22.	Dec. 16, 1963	9746 \$	1,877.40	Orma-Commerce
23.	Dec. 31, 1963	9786 .	5,960.00	Orma-Commerce
24.	June 12, 1964	10615	3,127.38	Orma-Commerce
25.	Aug. 17, 1964	10977	7,330.00	Orma-Commerce
26.	Sept. 28, 1964	11238	5,029.20	Alwatra, A.G.
27.	Sept. 15, 1965	13341	3,478.00	Etablissement Macoba

COUNT	DATE	CHECK NO.	TRUCMA	PAYEE
28.	May 17, 1965	15512	\$ 5,706.88	Export-Techniko
29.	Dec. 2, 1966	17272	. 19,781.88	Export-Techniko
30.	Jan. 3, 1967	17561	21,454.08	Export-Techniko

(In violation of 41 U.S.C. 54; 18 U.S.C. 2)

A True Bill.

Foreman of the Grand Jury

DAVID G. BRESS UNITED STATES ATTORNEY

## ESCROW AGREEMENT

## ESCROW ACREEMENT

THIS ESCROW AGREEMENT, made and entered into this day of April, 1970, by and between ANDREW L. STONE (hereinafter "Stone"), UNITED STATES OF AMERICA (hereinafter "United States") and ST. LOUIS UNION TRUST COMPANY, a Missouri corporation (hereinafter "Trust Company"),

WITNESSETH, That,

. WHEREAS, there is now pending in the United States District Court for the Eastern District of Missouri, Eastern Division, a Civil Action No. 69 C 24 (2), wherein the United States is plaintiff and Stone, et al., are defendants, and

WHEREAS, the United States desires to be assured that when, as and if judgment is obtained in said suit against Stone, or other final disposition is made of plaintiff's claims, sufficient assets of Stone will be available to satisfy such judgment or other final disposition, and

WHEREAS, in order to avoid the institution of attachment proceedings by the United States, Stone is willing to deposit certain securities with the Trust Company, in escrow, on the terms hereinafter set forth, and

WHEREAS, the Trust Company is willing to receive and hold such securities, in escrow, on the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the premises, it is covenanted and agreed as follows:

1. Stone has devosited with the Trust Company the securities listed in Exhibit "A" attached hereto, the receipt of which is hereby acknowledged by the Trust Company.

- securities until (a) all matters and things in controversy in said Civil Action No. 69 C 24 (2) shall be fully settled, compromised and adjusted and said civil action shall be dismissed by the plaintiff with prejudice, or (b) the United States and Stone, jointly, shall duly advise the Trust Company, in writing, that the said securities may be released from escrow and delivered to or upon the order of Stone, or (c) final judgment shall be entered and all appeals, if any, decided in said civil action in favor of defendant Stone, or (d) said securities shall be taken from it by due process of law.
- Company on account of any of the securities shall be deposited by the Trust Company in the account of Stone in the First National Bank in St. Louis. Any principal collected on any of said securities shall be reinvested by the Trust Company in (i) Government bills maturing in not more than six (6) months; (ii) Federal Home Loan Bank Bonds, or similar Government agency securities carrying the highest possible interest rate, due in approximately one (1) year, or (iii) certificates of deposit issued by the First National Bank in St. Louis, and maturing in not more than one (1) year, whichever yields the maximum amount of return. The securities and assets acquired by the aforesaid reinvestment shall be held by the Trust Company under and subject to the terms of this escrow agreement.
- 4. Stone agrees that insofar as it is within his power to do so, he will perform no act nor cause any act to be performed that will prevent Concord Control, Inc., a Massachusetts corporation located at 1282 Soldier's Field Road,

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Boston, Massachusetts, and each of its two operating divisions: namely K-D Lamp Company, located at 1910 Elm Street, Cincinnati, Ohio, and the Massachusetts division located at 1282 Soldier's Field Road, Boston, Massachusetts, from continuing to be operated in the ordinary course of business. Stone agrees that he will immediately upon entering into this agreement or as soon as practicable thereafter, give the necessary instructions to (a) cause quarterly balance sheets and income statements of Concord Control, Inc., and each of its aforesaid operating divisions, as they are prepared in the normal course of business, to be furnished to the United States as they are completed, and (b) permit a representative or representatives of the United States to inspect the books and records of Concord Controls, Inc., and each of its aforesaid operating divisions on a quarterly basis as they may desire. Stone agrees that there shall be no encumbrances placed upon the assets of Concord 10 The ixtent that such excumbrance Control, Inc., or any of its aforesaid operating divisions except, the ordinary course of business. No single encumbrance in the amount in excess of Two Hundred Thousand Dollars (\$200,000) shall be effected by Concord Control, Inc., or either of the aforesaid operating divisions except upon the giving of prior written notice of the proposed encumbrance by Concord Control, Inc., to the United States. Upon receipt of such notice, the United States shall have the right to object to the proposed encumbrance within thirty (30) days of receipt of said notice. No objection to such imposed encumbrance shall be made by the United States unless the encumbrance constitutes a concealment of an asset or the waste thereof. In the event Concord Control, Inc., encumbers assets of a value of

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Two Hundred Thousand Dollars (\$700,000) or more in any one month, it shall within twenty (20) days of the last day of the month in which said encumbrance is made, give notice to the United States of the encumbrance. Stone further agrees that he shall not sell, transfer or otherwise alienate the equitable or legal interest or title in any of the stock of Concord Control, Inc., or any of the aforesaid operating divisions, 100 per cent of which is owned by Stone and all of which is listed in Exhibit "A" except with the prior written consent of the United States.

Stone agrees that there shall be no sale, transfer or any other disposition of any of his remaining assets, to include the interest or dividends received by the Trust Company on account of the securities listed in Exhibit "A" and which shall be deposited in the account of Stone in the First National Bank in St. Louis, Missouri, except for reasonable living experses or for full and valuable consideration. With the exception of investments and reinvestments in (i) Municipal, State, and Federal Agencies' securities; (ii) Certificates of Deposit issued by any state or national banking institution and maturing in not more than two (2) years; or (iii) corporate bonds, debentures, and commercial paper, no sale, transfer or any other disposition of the said remaining assets (excepting reasonable professional fees and related professional expenses) in an amount in excess of One Hundred Thousand Dollars (\$100,000) shall not be effected by Stone or any of his agents or representatives without the giving of prior written notice to the United States. Upon the receipt of said notice, the United States shall have thirty (30) days within which to advise Stone

of its objection to the proposed sale, transfer or other disposition. The United States shall make no objection of such sole, transfer or other disposition unless that act constitutes a concealment of an asset or the waste thereof. in the event Stone or his representative effects any investment or reinvestment as described in subsections i, ii, and iii herein in an amount in excess of Fifty Thousand Dollars (\$50,000) in any one (1) month, Stone or his representative(s) shall give to the United States notice of said investment or reinvestment within twenty lest day of the month in which the (20) days after the investment or reinvestment is effected. Except as otherwise provided herein, if at the end of any calendar month Stone has disposed of assets of an aggregate value of Fifty Thousand Dollars (\$50,000) or more during such calendar month, this information shall, within twenty (20) days following the last day of that calendar month, be reported to the United States by Stone or his attorney or attorneys of record or other person authorized to do so by Stone. Stone further agrees that under the terms of this Escrow Agreement he hereby gives authority to his attorney or attorneys and any other person or persons authorized by him to permit a representative or representatives of the United States to inspect the books, records and other documents, wherever they may be located, that at reasonable periods relate to said remaining assets, from time to time, as they may desire.

6. Nothing herein shall be construed to prohibit Stone from the making of gifts or charitable contributions provided that, in the event he determines to give more than Twenty-five Thousand Dollars (\$25,000) to any single person or charity in any calendar year, Stone shall give the United States Written notice of that proposed gift or charitable contribution.

Upon receipt of said notice, the United States shall have thirty (30) days within which to advise Stone of its objection to the proposed gift or charitable contribution. No objection to such gift or charitable contribution shall be made by the United States unless the gift or charitable contribution constitutes the concealment of an asset or the waste thereof. In the event Stone in any given month expends an aggregate of Ten Thousand Dollars (\$10,000) in the making of gifts and charitable contributions, he shall within twenty (20) days after the last day of said calendar month give to the United States notice of said disbursements.

- 7. The United States agrees that, so long as Stone shall not be in default under any of his agreements hereunder, the Civil Division of the United States Department of Justice will not institute attachment proceedings against the property and assets of Stone, and shall use its best internal efforts to dissuade any other agency of the United States from proceeding by way of attachment or other lien against the property and assets of Stone.
- 8. The authorized representative of the United States under this agreement shall be the Assistant Attorney General in charge of the Civil Division of the United States Department of Justice.
- 9. All charges of the Trust Company for its services and expenses (including Court costs and reasonable attorneys fees, if any) which may be incurred in this connection, shall be paid by Stone and shall be a charge against the proceeds or income from the said securities held by the Trust Company under this agreement.

10. The terms of this Escrow Agreement shall be binding, by operation of law, upon the duly qualified representative of Stone's estate.

IN WITNESS WHEREOF, the parties hereto have caused this Escrow Agreement to be executed as of the day and year first hereinabove written.

UNITED STATES OF AMERICA

By Willean D Ten Bolyn

ST. LOUIS UNION TRUST COMPANY

By Classe Keer

# EXHIBIT "A" to ESCROW AGEMENT

Jssue	Interest Rate	Dated	Due	Par Value
Federal National Mortgage Association Series SM 1971K	8.12% ·	3/10/70	2/10/71	\$1,050,000
Independence, Missouri Sewer Bonds Series 1969	6.00%	7/1/69	7/1/72	\$ 50,000
New York, New York Anticipa- tion Notes Ltd. Profit Housing	7.48%	9/11/69	9/11/70	\$ 500,000
United States Treasury Bills			8/6/70	\$ 900,000
				\$2,500,000

Certificate No. C-21 dated 12/20/65 for 1,080 shares of Concord Control, Inc. in the name of Falrock Corporation and endorsed by Falrock Corporation to Andrew L. Stone, with Stock Power in blank.

Certificate No. C-22 dated 12/8/55 for 20,520 shares of Concord Control, Inc. in the name of Andrew L. Stone, with Stock Power in blank.

For ma. ni Cafeils: flus will authorage you on my behalf to correct the Moppied escrow a greenent Leiter can the Unieter States It, Jours Timeon Freest and my self try deleting a Paraglaph 3 thereby the words "apportunately once (1) byear jane eleterting in to heir place the words not more than Three. (3) years, and to initeal such confection. Hery bruly yours. Challew of Stone it nickaliste, de. teren Book Blog. " Louis 710. 63102

STATUTORY NOTICE OF DEFICIENCY
Address any reply to: P.O. Box 3167 Thurch St. Sea., New York N.Y. 10008

Deposit watch of Older Transacting

Districts Districts Districts

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Internal Ravenue Service

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AU: R: 900

Tel. 264-3109

140321713

Mr. Andrew L. Stone and Mrs. M. Jeanne Stone 7733 Forsythe Street St. Louis, Missouri

Dear Sir and Madam:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of your Federal income tax liability for the taxable years ended December 31, 1963, December 31, 1964, December 31, 1965, December 31, 1966 and December 31, 1967, discloses deficiencies in tax aggregating \$4,739,241.14 and additions to the tax for fraud under Code section 6653(b) aggregating \$2,369,620.59, as computed in the attached statement. Assessment of the deficiencies and additions to the tax mentioned has been made under the provisions of the internal revenue laws applicable to jeopardy assessments.

If you decide to contest this determination, you must do so by filing a petition within 90 days (150 days if you are outside the States of the Union and the District of Columbia) from the date of this letter with the United States Tax Court in accordance with its rules. A copy of the rules of the Court may be obtained by writing to the Clerk, United States Tax Court, Box 70, Washington, D.C. 20044.

Very truly yours,

Johnnie M. Walters Commissioner

By

District Director

Enclosure: Statement

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BEST CUPY AVAILABLE

#### Statement

Andres L. Stone and M. Jeanno Stone 7733 Forsythe Street St. Louis, Missouri

## Tax Liability for the Taxable Years Endod

December 31, 1983 December 31, 1984 December 31, 1985 December 31, 1986 December 31, 1987

#### Inouse The

Carpillo Yourn Ended	<u> Postoloner</u>	Trans Littleton
Decombor 31, 1963	\$ 171,403.03	\$ 65,744.02
Poccaber 31, 1984	1,347,174.97	673,507.49
December 31, 1965	1,345,609.33	972,815.17
December 31, 1966 December 31, 1967	992,449.38	496, 224.69
CONTRACT OF ESOL	232,433.43	141.249.22
Total	\$4,730,241.14	02,289,000.50

In making this determination of your income tax liability, careful consideration has been given to the report of examination, a copy of which was mailed to you on October 16, 1970.

It is determined that all or part of the underpayment of tax required to be shown on a return for the taxable years ended December 31, 1963, December 31, 1964, December 31, 1965, December 31, 1966 and December 31, 1967 is due to fraud, therefore the 50% addition to the tax provided by section 6653(b) of the Internal Devenue tode of 1954 is asserted for those years.

A chiplicate original of this letter and statement is being mailed to you at 2501 South Marson Road, LaDue, Missouri, 63124; and a mulicate original of this letter and statement is being mailed to be being to be be the Marden, Fe bend Ponitentiary, Lewisburg, Lewi

I comy of this letter and statement is being united to your representative, Boris Mostelaneis, Bog., B2 Wall Street, New York, N.Y. 10-70 in accordance with insuractions contained in the power of aftermay executed by you.

BEST COPY AVAILABLE

Statement

Adjustments to Income and ... Computation of Tax

				JA50			
1967	\$519,278.79 (	233,635.00	2,274.51	\$359,530.13 \$533,432.35	\$539, 432.95 256, 994.52	1282, 498, 43	423,747.65
1966	\$ 78,032.26	1,096,553.00	2,192.99	\$1,626,917.68 \$1,024,157.51	\$1,024,157.51	\$ 992,449.38	\$ 496,224.69 1,488,674.07
1965	\$ 95,432,93	2,755,767,00	2,317.44	\$2,867,517.\$7 \$1,985,733.48	\$1,985,733.48	\$1,945,630.33	\$ 972,815.17
1964	\$ 40,997.04	1,802,262.00.7	2,308.00	\$1,396,623.71	\$6,073.52 \$1,360,550.19	\$1, 147,174,97	3,020,12,49
1963	\$ 30,171.53 \	230,700.00	200.00	\$190,255.65	9, 242, 42 \$181, 014, 23	\$171,488.03	\$ 05,744,02
•	Taxible income disclosed by return	Additional income and unallowable deductions: (a) Divident income (b) Long-term capital gain. (c) Interest expense		Taxable income as adjusted Corrected applicable tax Less: dividends received	Corrected income tax liability. Tax shown on return	Deficiency in tax	Trand addition at 50% of the deficiency

1,507 264.78 1,4018.00 1758 244.28 5.8.8. Andrew L. Stone and H. Jeanna Stone

-3-

Statement

## Explanation of Adjustments

(a) It is determined that you realized tamble income in the amounts set forth from constructive dividends as detailed below. You did not report this income on your Federal income tax returns.

#### 1963:

Chromoraft Corporation - diverted income and expense disallowances in the following categories are held to have inured to Andrew L. Stone:

Sales income and royalty income	\$ 13,866.00	
Purchases (diverted payments)	130,552.00	
Travel and entertaimment	24,426.00	
Sundry exponses	25,400.00	
logal expense	22,250.60	× 100
Rent exponse	1,265.00	\$218,759.00

Chromeraft, Inc. (Miss.) - farming expenses charged to this corporation for the operation of Key Stone Farms are held to have been expended for the benefit of Andrew L. Stone
Total constructive dividends for 1963

\$230,700.00

#### 1964:

Chromoraft Corporation - diverted income and expense disallownces in the following categories are hold to have imured to Andrew L. Stone:

Royalty income (Zechrugge) Purchases (diverted payments)	\$ 13,700.00 \\ 1,187,442.00
Travel and entertainment	29,121.00
Sundry expenses	48,323.00
Legal expense	24,337.00
Rent expense	
Purchasos, Dies, Jigs	13,265.00
and bear a root a root .	63,930.00 \$1.379.118.00

Chromoraft, Inc. (Miss.) - farming expenses charged to this corporation for the operation of Key Stone Farms are held to have been expended for the benefit of Andrew L. Stone

9,126.00

Chromeraft, Inc. (N.Y.) - distribution from this corporation in order to acquire \$400,000.00 of preferred stock of K-D Lamp Co. is held to have been made for the benefit of Androw L. Stone

400,000.00

Amires L. Stone and M. Jesmas Jtone

and the

Statement

Chromoraft, Inc. (Miss.) - The difference of \$14,013.03 between the book value of property conversed by this corporation to Amiron L. Stone and the fell market value of the property as determined is held to have insered to the benefit of Andrew L. Stone 14.

Total constructive dividends for 1984

14,018.00

#### 1305:

Chronesaft Corporation - diverted income and expense disallowances in the following categories are hald to have immed to Andrew L. Chone:

Seles inema (Rechauge)		\$ 153,059.00
Purchases (diverted succepts)	14.	2,246,820.00
Immel and entertainment		31,737.00
Dentity expanses		112,745.00
· Legal confirme		31,750.00
The capping		12,359.66
- Boyalty income (Zoebragge)		101,321.00
Tools and dies		37,500.00
Calarios and wages Stal constructive dividends for 1988		21, 575,00

\$2,755,757.00

#### 1-100-2

Constructive dividence out of the folioring companies and in the amounts set forth are charged to Andrew L. Stone this is on the cash basis, the indicated companies being on the indicated fiscal periods:

Chromosoft Corporation (1/1/65 to 4/9/63)

Techfold Division of Alace (4/10/65 to 5/51/65)

703,294.00

211.003.00

Schiab Livision of Alsos (Fincal Year envied 5/31/57)
Total constructive dividence for 1968

\$1,005,553.0

#### 1 7:3:

Techiab division of Alseo - constructive dividends out of the flocal years indicated are allocated to Andrew L. Giono for amounts invring to him on the cash legis:

Alsco Inc. - fiscal year ended 5/31/67 \$170,964.00 Flaco Inc. - fiscal year ended 5/31/68 62,671.00 Total constructive dividends for 1967

\$233,635.00

Amirew L. Stone and M. Jeanna Stone Statement

(b) It is determined that you realized a long-term capital gain, taxable in the emount of \$419,732.00, in 1985 resulting from diverted income and expense disallowances computed as set forth below. You did not report this income on your Yederal income tax return.

		집에 있는 사람이 가게 하면 하게 되었다면 하다 때 없는데 없다.
From Chromoraft Corporations Sales income (Zeebrugge)	1 18	1,903,00
Royalty income (Zeebrugge)		18,770.00
Furtheses (diverted payments)		883,896.00
Travel and entertainment		5,491.00
Chindry expenses		15,804.00
Legal expense	William !	13,000.00
Rent expense		63303
Purchases (Dies and jigs)		36,700.00
Salaries and wages		1,036.00
Factory office expense		303,887.00
Constructive distribution charged in 1966	\$	1,236,120.00
Ternings and profits available		177,281.00
Neturn of capital - A.L. Stone's basis	\$	1,103,639.00
Etock in Chromoreft as adjusted		259,376.00
Excess over basis return of capital	\$ 14-1 <b>\$</b>	833,463.00
Long-term capital gain at 50%	\$	419,732.00
#####################################		

And in 1967 your reported \$1,022,379.10 long-term capital gain is adjusted to \$1,031,581.46 with the \$9,202.36 difference taxable at 50% or \$4,601.18.

- (c) Your claimed deductions for interest expense are disallowed in the amounts stated because you did not establish that the disallowed portions of the claimed deductions represent interest on bona fide indebtedness.
- (d) Your claimed deductions for employee business expenses are disallowed in the amounts stated because you did not establish that the disallowed portions of the claimed deductions represent ordinary and necessary business expenses or that expenditures were made for the purposes designated.
- (e) Your claimed deduction of \$856.00 for contributions in 1963, to the extent that it includes \$200.00 designated as "Sundry organized religious, medical and educational charities," is disallowed for lack of substantiation.

JA54

#### PETITION RE: ANDREW STONE

UNITED STATES TAX COURT

FILFO

	1972 JUL 3 PM 3 13
ANDREW L. STONE,	)
Petitionar	UNITED CTATES
v.	) DOCKET NO.
COMMISSIONER OF INTERNA	AL REVENDEE CEIVED IN 5311-72
	3 JUL 17 1972
	CHIEF COUNSEL'S OFFICE
	PETITION   REVENUE SERVICE

The above-named Petitioner hereby petitions for redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (bearing symbols AU:R:90D), dated April 6, 1972, and which were assessed on February 7, 1972, pursuant to \$6861(a) of the Internal Revenue Code of 1954. As a basis of this proceeding, the Petitioner alleges as follows:

- 1. The Petitioner is a legal resident of St. Louis,
  Missouri. The Petitioner's income tax returns for the periods
  involved in this petition were filed with the District Director of Internal Revenue for the District of Manhattan, New
  York, New York.
- 2. The Notice of Deficiency, a copy of which is attached hereto and marked Exhibit "A", was mailed to the . Petitioner on April 6, 1972.

3. The Commissioner determined deficiencies in income tax and penalties as follows:

Taxable Years Ended	Deficiency	Fraud Addition
December 31, 1963 December 31, 1964 December 31, 1965 December 31, 1966 December 31, 1967	\$ 171,488.03 1,347,174.97 1,945,630.33 992,449.38 282,498.43	\$ 85,744.02 673,587.49 972,815.17 496,224.69 141,249.22
TOTAL	\$ 4,739,241.14	\$ 2,389,620.59

- 4. The determination of tax set forth in said Notice of Deficiency is based on the following errors:
- (a) The assessments set forth in said Notice of Deficiency are barred by reason of §6501 of the Internal Revenue Code of 1954.
- (b) The Commissioner erred in determining that all or part of the underpayment of tax required to be shown on the returns for the taxable years 1963, 1964, 1965, 1966, and 1967 is due to fraud and therefore subject to the 50% addition to the tax provided by §6653(b) of the Internal Revenue Code of 1954.
- (c) The Commissioner erred in determining that the Petitioner realized constructive dividend income for the years 1963, 1964, 1965, 1966, and 1967 in the respective amounts of \$230,700.00, \$1,802,262.00, \$2,755,767.00, \$1,096,553.00, and \$233,635.00.

- (d) The Commissioner erred in determining that the Petitioner realized long-term capital gain for the years 1966 and 1967 in the respective amounts of \$419,732.00 and \$4,601.18, allegedly resulting from diverted income and expense disallowances of Chromcraft Corporation.
- (e) The Commissioner erred in determining that the Petitioner was not entitled to deduct certain interest expense for the years 1963, 1964, 1965, 1966, and 1967 in the respective amounts of \$2,098.55, \$17,000.00, \$34,000.00, \$30,407.43, and \$199,740.65, allegedly because such amounts did not represent interest on bona fide indebtedness.
- (f) The Commissioner erred in determining that the Petitioner was not entitled to certain employee business expenses for the years 1964, 1965, 1966, and 1967 in the respective amounts of \$2,308.00, \$2,317.44, \$2,192.99, and \$2,274.51, allegedly because the Petitioner did not establish that such expenses represent ordinary necessary business expenses or were not made for the purposes designated.
- 5. The Petitioner relies upon the following facts as a basis for this case:
- (a) The Petitioner filed joint income tax returns with his wife, M. Jeanne Stone, for each of the calendar years 1963 through 1967 on a cash basis.

- (b) The Commissioner made a jeopardy assessment, pursuant to \$6861 of the Code, against the Petitioner on February 7, 1972, and subsequently mailed said Notice of Deficiency on April 6, 1972. Such assessment and Notice of Deficiency were made more than three years after each of the said joint income tax returns for the calendar years 1963 through 1967 were filed and are therefore barred by \$6501 of the Code.
- (c) The Petitioner was the president of Chromcraft Gorporation (hereinafter referred to as Chromcraft) at all times during the period of 1963 through May 31, 1966, when such corporation was dissolved. The Petitioner owned 75% of the stock of Chromcraft from 1959 through 1964 and owned 100% of such stock during the period 1965 through April 9, 1966.

  In 1965, Chromcraft sold its tradename "Chromcraft" and thereafter did business under the tradename "Techfab".
- (d) On May 31, 1966, Chromcraft merged with Alsco, Inc. subsequent to an exchange of stock whereby the Petitioner exchanged 100% of his stock of Chromcraft for approximately 52% of the stock of Alsco, Inc. The Petitioner became president of Alsco and continued as president until Alsco was sold to Harvard Industries on February 12, 1969.
- (e) Sales income for the years 1963, 1965, and 1966 in the amounts set forth in said Notice of Deficiency,

which the Commissioner alleges to be dividend income to the Petitioner, was not a constructive receipt of the Petitioner.

- (f) Royalty income for the years 1963, 1964, 1965, and 1966 in the amounts set forth in said Notice of Deficiency, which the Commissioner alleges to be dividend income to the Petitioner, was not a constructive receipt of the Petitioner.
- (g) Purchases for the years 1963, 1964, 1965, and 1966 in the amounts set forth in said Notice of Deficiency, which the Commissioner alleges to be dividend income to the Petitioner, were not constructive receipts of the Petitioner.
- (h) Travel and entertainment expenses for the years 1963, 1964, 1965, and 1966 in the amounts set forth in said Notice of Deficiency, which the Commissioner alleges to be dividend income to the Petitioner, were not constructive receipts of the Petitioner.
- (i) Sundry expenses for the years 1963, 1964.

  1965, and 1966 in the amounts set forth in said Notice of

  Deficiency, which the Commissioner alleges to be dividend income to the Petitioner, were not constructive receipts of the Petitioner.
- (j) Legal expenses for the years 1963, 1964, 1965, and 1966 in the amounts set forth in said Notice of Deficiency, which the Commissioner alleges to be dividend income to the Petitioner, were not constructive receipts of the Petitioner.

- (k) Rent expenses for the years 1963, 1964, 1965, and 1966 in the amounts set forth in said Notice of Deficiency, which the Commissioner alleges to be dividend income to the Petitioner, were not constructive receipts of the Petitioner.
- (1) Farm expenses for the years 1963 and 1964 in the amounts set forth in said Notice of Deficiency, which the Commissioner alleges to be dividend income to the Petitioner, were not constructive receipts of the Petitioner.
- (m) Purchases of dies and jigs for the years 1964, 1965, and 1966 in the amounts set forth in said Notice of Deficiency, which the Commissioner alleges to be dividend income to the Petitioner, were not constructive receipts of the Petitioner.
- (n) The purchase by Chromcraft in 1964 of preferred stock of K-D Lamp Company, at a cost of \$400,000.00, which the Commissioner alleges to be dividend income to the Petitioner, was not a constructive receipt of the Petitioner.
- (o) The sale of certain real property in 1964

  by Chromcraft, Inc. (Miss.) to the Petitioner, which the

  Commissioner alleges was \$14,018.00 below the fair market

  value and was therefore dividend income to the Petitioner in

  that same amount, was a sale for full fair market value and

  therefore did not result in dividend income to the Petitioner.

- (p) Salaries and wages in the years 1965 and 1966 in the amounts set forth in said Notice of Deficiency, which the Commissioner alleges to be dividend income to the Petitioner, were not constructive receipts of the Petitioner.
- (q) Factory office expenses for the year 1966 in the amount set forth in said Notice of Deficiency, which the Commissioner alleges to be dividend income (and a long-term capital gain resulting from diverted income and expense disallowances), were not constructive receipts of the Petitioner.
- (r) Amounts relating to the Techfab division of Alsco, Inc. for the period April 10, 1966, through May 31, 1966, and the fiscal year ended May 31, 1967, in the amounts set forth in said Notice of Deficiency, which the Commissioner alleges to be dividend income to the Petitioner for the year 1966, were not constructive receipts of the Petitioner.
- (s) Amounts relating to the Techfab division of Alsco, Inc. for the fiscal years ended May 31, 1967, and May 31, 1968, in the amounts set forth in said Notice of Deficiency, which the Commissioner alleges to be dividend income to the Petitioner for the year 1967, were not constructive receipts of the Petitioner.
- (t) Interest expense for the years 1963, 1964, 1965, 1966, and 1967 in the amounts set forth in said Notice of De- . ficiency were amounts paid by the Petitioner to Finanz, Gmbh.

(u) Employee business expenses for the years 1964, 1965, 1966, and 1967 in the amounts set forth in said Notice of Deficiency were amounts paid by the Petitioner for expenses relating to his employment.

WHEREFORE, the Petitioners pray that the Court may hear the proceeding and:

- 1. Determine that the Commissioner erred as alleged in each assignment of error set forth in paragraph 4 hereinabove.
- 2. Find that the deficiencies in income tax for the calendar years 1963 through 1967 set forth in said Notice of Deficience are excessive to the extent objected herein.
- 3. Give such other and further relief as in the premises the Court may deem fit and proper.

Thomas A. Davis

Attorney for the Petitioner Smathers & Merrigan Suite 1200 888 Seventeenth Street, N. W. Washington, D. C. 20006 Union County ) SS:

ANDREW L. STONE, being duly sworn, says that he is the Petitioner above named, and that he has read the foregoing petition, or has had same read to him, and is familiar with the statements contained therein, and the statements contained therein are true, except those stated upon information and belief, and those he believes to be true.

Andrew L. Stone

Sworn to and subscribed before me

this 2th day of July . 1972

Source C. Balsis
Notary Public

GEORGE C. PIVER MUTARY PURLIC KELLY TOWNSHIP L. HUM COUNTY MY COMMISSION EXPERS MAY 3 1.76 Parbor Panesymania Association 2.1013TPS ANSWER RE: ANDREW STONE UNITED STATES TAX COURT

ANDREW L. STONE,

Petitioner.

V.

Docket No. 5311-72

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

### ANSWER

THE RESPONDENT, in answer to the petition filed in the above-entitle case, admits, denies and alleges as follows:

- 1. Admits that the petitioner is an individual who on July 3, 1972 had an address at 7733 Forsythe Street, St. Louis, Missouri, and that he filed United States income tax returns for the tax years 1963, 1964, 1965, 1966 and 1967 with the District Director of Internal Revenue, Manhattan District, New York, New York. Denies the remaining allegations of paragraph 1 of the petition.
- 2. Admits the allegations of paragraph 2 of the petition.
- 3. Admits the allegations of paragraph 3 of the petition.

- 4 (a) to (f), inclusive. Denies that the respondent erred as alleged in subparagraphs (a) to (f), inclusive, of paragraph 4 of the petition.
- 5 (a). Admits the allegations of subparagraph (a) of paragraph 5 of the petition.
- (b). Admits the allegations of subparagraph (b) of paragraph 5 of the petition, except that it is denied that the assessment of the deficiencies is barred by \$6501 of the 1954 Code.
- (c). Admits that the petitioner was president of Chromcraft Corporation. Denies the remaining allegations of subparagraph (c) of paragraph 5 of the petition.
- (d). Admits that the petitioner was president of Alsco, Inc. Denies the remaining allegations of subparagraph (d) of paragraph 5 of the petition.
- (e) to (u), inclusive. Denies the allegations of subparagraphs (e) to (u), inclusive, of paragraph 5 of the petition.

of rocket launchers pursuant to contracts with the Department

of the outstanding shares of stock of Chromcraft Corp.

On April 9, 1966, Alsco, Inc. acquired all

or denied.

of Defense.

(e). During the taxable years 1963, 1964, 1965, 1966 and 1967, the officers and directors of Chromcraft Corp. and Alsco, Inc. caused inflated and or fictitious invoices for component parts of rocket launchers, and for fictitious services to be entered on the books and records of these corporations. The understated taxable income of Chromcraft Corp. and Alsco, Inc. was diverted to or for the benefit of their officers and directors. The charges for fictitious invoices for component parts and services so diverted consisted of the following:

		1963		1964			1965			1966	_	1	967	i
Chromeraft Corp						•						٠.	•	+
Western	\$ 8.	983.60	\$ 130	5,034.90	\$ 2	221,	084.62	\$	142,	494.	40	\$ -		
Scientific		174.81	1,10	2,165.64	1,1	199,	678.10					•	-	1-
Bregman Elec	:-													1
tronics							385.68			774.		•		
Velo							000.00			,627,		•		:
Zeebrugge	13,	793.00	1	3,700.00	2	259,	380.20		20	672.	. 76-		• ••	
Payments to														1
Chromcraft														. ;
suppliers by					•									į.
Scientific	(24	,374.26)		(358.26)				-			-			
	\$106	,577.15	\$1,25	1,542.28	\$2,6	647,	528.60	\$	782	,568	.97	\$ .		;
Alsco, Inc.														i
Western	\$		\$		\$			\$		,911		\$ .		;
Velo		eo eo								,700			250.	
Zeebrugge				-					54	,981	.00	27	<u>,932.</u>	39
Total	\$	• •	\$		\$			\$_	408	,592	.68	\$28	,182.	39
Total														
Diverted	\$106	,577.15	\$1,25	1,542.28	\$2,	647	,528.60	\$1	,191	,161	.65	\$28	.182	39

(f). During the taxable years 1963, 1964, 1965, 1966 and 1967, the petitioner received constructive dividends from diverted taxable income of Chromcraft Corp. and Alsco, Inc., as follows:

	1963	1964	1965	1966	1967
Chromoraft (Constructive dividends)	\$106,650.15	\$1,251,542.28	\$2,492,528.20		
Chromcraft (Capital gains)		••		\$357,554.00	
Alsco, Inc. (Constructive dividends)		61 251 5/2 28	\$2,492,528.20	408,592.68 \$766.146.68	
Total	\$106,650.15	\$1,231,342.26	72,432,320.20	7700,140.00	

(g). For each of the taxable years 1963, 1964, 1965, 1966 and 1967, petitioner wilfully and knowingly filed false and fraudulent income tax returns. Said returns reflected

taxable income in the respective amounts of \$30,171.53, \$40,997.04, \$95,432.93, \$78,032.26 and \$519,278.29, whereas, petitioner's true taxable income for the years 1963, 1964, 1965, 1966 and 1967, was in the respective amounts of \$263,170.08, \$1,848,550.04, \$2,901,535.37, \$1,538,276.68 and \$959,530.13.

- (h). The failure of petitioner to report on his income tax returns for the taxable years 1963, 1964, 1965, 1966 and 1967, the amounts set forth in subparagraph (f) above, was wilful, fraudulent, and with intent to evade tax.
- (i). A part of the understatements of tax required to be shown on the petitioner's income tax returns for the taxable years 1963, 1964, 1965, 1966 and 1967, is due to fraud.
- 8. FURTHER ANSWERING the petition, and as a defense to the assignment of error that the statute of limitations bars the assessment and collection of the deficiencies in income taxes due from the petitioner for the taxable years 1963, 1964, 1965, 1966 and 1967, the respondent alleges:

- (a). The income taxes due from the petitioner for the taxable years 1963, 1964, 1965, 1966 and 1967, may be assessed, or a proceeding in Court for the collection of such taxes may be begun without assessment, at any time under the provisions of \$6501(c)(1) of the 1954 Code, since the petitioner filed false or fraudulent income tax returns for said years with intent to evade tax, as is more fully set forth by the facts alleged in paragraph 7 above, which facts are incorporated herein by reference and relied upon by the respondent as a defense to the statute of limitations issue.
- (b). The income tax due from the petitioner for the taxable years 1963, 1964, 1965, 1966 and 1967, were timely assessed under the provisions of §6501(c)(4) of the 1954 Code, in support of which the respondent alleges:
- (1). The petitioner's income tax returns for the taxable years herein in issue were filed as follows:

Taxable Year	Date Filed		
1963	April 15, 1964		
_ 1964	April 15, 1965		
1965	April 15, 1966		
1966	April 15, 1967		
1967	August 15, 1968		

(2). Prior to the expiration of the time prescribed by §6501(e) of the 1954 Code, for the assessment of income tax due from the petitioner for the taxable year 1963, the petitioner and the respondent on February 13, 1970. timely executed an agreement in writing pursuant to the provisions of §6501(c)(4) of the 1954 Code, extending the period for the assessment of tax due for said year to June 30, 1971. The said extended date for assessment of tax was further extended under a subsequent agreement in writing duly and timely executed by said parties on December 21, 1970, which subsequent agreement extended the said period of limitations for assessment to June 30, 1972. Prior to the expiration of the time prescribed by §6501(a) of the 1954 Code, for the assessment of income tax due from the petitioner for the taxable years 1964, 1965, 1966 and 1967, the petitioner and the respondent, timely executed agreements in writing pursuant to the provisions of §6501(c)(4) of the 1954 Code, extending the period for assessment of tax due for said years as follows:

Taxable Year	( Date Executed	Ctatute .xtended To		
1964 1965 1966 1967	March 4, 1968 December 18, 1968 February 16, 1970 December 21, 1970	June 30, 1969 June 30, 1970 June 30, 1971 June 30, 1972		

The said extended dates for assessment of tax were further extended under subsequent agreements in writing duly and timely executed by said parties as follows:

Taxable Year		Date Executed				Statute Extended To		
1964		December	18,	1968	June	30,	1970	
		February			June	30,	1971	
		December			June	30,	1972	
1965		February			June	30,	1971	
		December			June	30,	1972	
1966		December			June	30,	1972	

which subsequent agreements consecutively extended said period of limitations for assessment to June 30, 1972.

ment as duly and timely extended under the consecutive agreements in writing executed by both the petitioner and the respondent, a jeopardy assessment was made pursuant to \$6861 of the 1954 Code, on February 7, 1972. The statutory notice of deficiency setting forth the respondent's determination of the petitioner's income tax liability for the taxable years 1963, 1964, 1965, 1966 and 1967, was timely sent to the petitioner by certified mail on April 6, 1972.

WHEREFORE, it is prayed:

- (1). That the relief sought in the petition be denied;
- (2). That the deficiencies in income taxes for the taxable years 1963, 1964, 1965, 1966 and 1967, as set forth in the statutory notice, be in all respects approved;
- (3). That the additions to the tax for the taxable years 1963, 1964, 1965, 1966 and 1967, under the provisions of §6653(b) of the 1954 Code, as set forth in the statutory notice, be in all respects approved; and
- (4). That the Court determine that the assessment and collection of the deficiencies in income taxes for the taxable years 1963, 1964, 1965, 1966 and 1967, as set forth in the statutory notice, are not barred by the statute of limitations.

(Sgd) LEE H. HINKEL, JR. - JJM

LEE H. HENKEL, JR.

Chief Counsel

Internal Revenue Service

OF COUNSEL:

MARVIN E. HAGEN
Regional Counsel
POWELL W. HOLLY, JR.
Attorney
Internal Revenue Service
26 Federal Plaza (12th Floor)
New York, N. Y. 10007

o compliant

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS

JA73

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ANDREW L. STONE and M. JEANNE STORE,

Plaintiffs,

74 Civ. 3643 (EW)

UNITED STATES OF AMERICA and DISTRICT DIRECTOR OF INTERNAL REVENUE. MANHATTAN DISTRICT. APPIDAVIT IN OPPOSITION TO

MOTION TO DISMISS

Defendants.

STATE OF NEW YORK )
COUNTY OF NEW YORK : 98.
SOUTHERN DISTRICT OF NEW YORK )

WALLACE MUSOFF, being duly sworm, deposes and says:

- 1. I see a member of the law firm of Wagman, Cannon & Musoff, P.C., 136 East 37th Street, New York, N.Y. 10022, attorneys for the plaintiffs in this action. As such, I am familiar with the matters contained in this affidavit.
- 2. I make this effidavit in opposition to the defendants' motion to discuss plaintiffs' complaint for lack of subject matter juris-diction and for failure to state a claim upon which relief can be granted.
- 3. Defendants have to date not filed a responsive pleading to the complaint in this action.
- 4. Although plaintiffs believe that their complaint herein meets the requirements of Rule 3 of the Federal Rules of Civil Procedure (Ped. R. Civ. Pr.), as indicated by the fact that defendants have had no difficulty in determining the relief sought and the type of claims presented (Defendants' Newco of Law, pp.1, 2 and 10-14), plaintiffs, nevertheless, in order to obviete the main thrust of the procedural issues raised in Points II and III of defendants' argument (Defendants' Newco of Law) and to further clarify their claims for relief, herewith file as a

JA74

matter of course a First Amended Complaint (a copy of which is annexed hereto as Exhibit A) pursuant to Rule 15(a), Fed. R. Civ. Pr.

- 5. The First Amended Complaint separately states each claim for relief sought in the original complaint and is founded upon the same "conduct, transaction, or occurence set forth or attempted to be set forth in the original pleading." It further differs from the original complaint in the following respects:
- a) Plaintiffs further allege in paragraph 3 of their First Amended Complaint that this action additionally arises under "an escrow agreement entered into between Plaintiff Andrew L. Stone and Defendant United States of America" and 26 U.S.C. Sec. 6213(a).
- b) Plaintiffs further allege in paragraph 4 of their First Acended Complaint that jurisdiction is additionally conferred upon this Court by virtue of 28 U.S.C. Sec. 1346(a) and that Plaintiff Andrew L. Stone limits his claim for damages with respect to his contract with the Covernment of the United States to no more than \$10,000.00
- c) Plaintiffs further allogs in paragraph 14 of their First Amended Complaint (which adopts in its entirety paragraph 27 of the original complaint) that they "face complete financial ruin" as a result of defendants' conduct.
- d) Plaintiffs further allege in paragraph 25 of their First Amended Complaint (Fourth Claim for Relief) that the computations of tax underlying the jeopardy assessments involved herein are arbitrary and capricious in that such computations are based upon income that the plaintiffs never received and which very income was in fact attributed by the Internal Revenue Service to another tempsyor, one Francis M. Rosenbaum.
- e) Plaintiffs further allege in their Fifth Claim
  for Relief in their First Amended Complaint (paragraphs 28 through 33) that
  Plaintiff M. Jeanne Stone was concededly not involved in her husband's alleged

Transmit ouresions of income; that she was determined to be liable for the tax involved solely by virtue of the fact that she signed the pertinent joint income tex returns and that none of her sesets liened and levied upon as a result of the jeopardy assessments amanated from any of the alleged omissions of income attributed to her husband. (Attached herato as Exhibit B is a copy of a motion filed in the Tax Court case and a copy of p. 16 of a treascript in the Tax Court proceedings indicating the Government's concession of no fraud with respect to H. Jeanne Stone.) 6. None of the counts of the respective indictments (Exhibits A and B to Defendants'Affid.) to which Plaintiff Andrew L. Stone pleaded guilty (Pars. 4 at 6 of Defendants' Affid.) constitute an admission that he either failed to report his own income or that he attempted to underpay any of his income tax that might be due and owing. He was never

- convicted or criminally charged with any income tax violation.
- 7. The motions made by Plaintiff Andrew L. Stone in pretrial proceedings entitled Alsco-Harvard Fraud Litigation discussed in paragraphs 14 through 16 of Defendants' Affidavit and the decisions of Judge Weiner do not constitute a ber to the action herein as recognized by the Defendants who have set forth this information apparently for background purposes only.
- 8. Plaintiffs commenced their action, as correctly perceived by Defendants on pages 1 and 2 of their Memorandum of Law. essentially sacking the following relief:
- a) an order emjoining defendants from enforcing, by lien, levy or etherwise, jeopardy assessments made egainst plaintiffs for income tax deficiencies, plus interest and panalties, totalling \$7,108,561.73 for the taxable years 1963 through 1967;
- b) specific enforcement of an escrow agreement, dated July 24, 1970, by causing release to Plaintiff Androw L. Stone of income from escrow assets which has not been paid Stone by reason of Defendants' enforcement of the jeopardy assessments; and

- e) judgment in favor of Plaintiff Andrew L. Stone for damages for bracch of the secret agreement. (Damages in the smount of \$6,000,000.00 was requested in the original complaint but has been reduced to not in excess of \$10,000.00 in the First Amended Complaint pursuant to the limitations of 28 U.S.C. Sec. 1346(a).)
- 9. Both the original complaint and the First Amended Complaint (which has been filed herewith as a matter of course pursuant to Rule 15(a), Fed. R. Civ. Pr.) set forth subject matter which confers jurisdiction upon this Court and state claims upon which relief can be granted. They outline a course of conduct by defendants indicating:
  - a) a breach of contract with Plaintiff Andrew L. Stone;
- b) that the defendants failed to entertain the goodfaith belief required by 26 U.S.C. Sec. 6861(a) that jeopardy existed;
- c) that, to the contrary, defendants not only omitted to follow the statutory requirements for making a jeopardy assessment, but failed to follow their own procedural rules as well;
- d) that defendants were making "a merely colorable use of the statutory forms" for an ulterior motive;
- e) that defendants' purpose in asserting the jeopardy assessments was not to collect taxos or preserve the revenue but to harass and punish plaintiffs;
- f) that the tax computations underlying the jeopardy assessments were arbitrary and capricious in that they attribute to Plaintiff Andrew L. Stone income that he did not receive and which in fact was attributed by defendants to another;
- g) that the defendants by bad-faith and arbitrary and capricious conduct have violated plaintiffs' Fourth and Fifth Amendment rights:

h) that Plaintiff H. Jeanne Stone is an innocent spouse whom defendants have conceded played no part in the alleged omissions of income involved herein; and

i) that plaintiffs face complete financial ruin as a result of defendants' course of conduct.

10. A failure by the Court to exercise jurisdiction and entermain the merits of this action would render every citizen helplessly subject to the exercise of unbridled and tyrannical conduct by the Executive Branch of Government, an intolerable situation and a formidable step in the breakdown of our democratic institutions as a nation of laws and not men.

11. Plaintiffs submit a memorandum of law in opposition to defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. For the reasons set forth therein, affiant respectfully submits that defendants' motion should in all respects be denied.

WHEREFORE, affiant prays that defendants' motion should in all respects be denied.

WALLACE MUSOFF

Sworm to Before me this 20 day of James 1975.

4

Energy of Colon

EVELYN I. COLON
NOTARY PUBLIC. State of New York
No. 03 4519611
Qualified in Bronx County
Term Expires March 30, 1976

3499

**JA78** 

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ANDREW L. STONE and M. JEANNE STONE.

Plaintiffs.

PLAINTIFFS' INTERROGATORIES TO DEFENDANTS

V.

UNITED STATES OF AMERICA and DISTRICT DIRECTOR OF INTERNAL REVINUE, MANHATTAN DISTRICT.

74 CIV. 3643 (EW)

Defendants.

## PLAINTIFFS' INTERROGATORIES TO DEFENDANTS

The plaintiffs request, pursuant to Rule 33 of the Federal Rules of Civil Procedure, that the following interrogatories be answered under oath by an employee of the United States competent to testify on behalf of the defendants regarding each inquiry made and that the answers be served upon the plaintiffs, through their counsel, Wagnan, Cannon & Musoff, P.C., 136 East 57th Street, New York, N.Y. 10022, within 30 days from the time these interrogatories are served upon you.

## INSTRUCTIONS AND DEFINITIONS

A. If no one employee of the United States can respond under oath to each and every interrogatory which follows, each employee who responds to any interrogatory shall state at the conclusion of the responses, under oath,

is the subject of such response. In the absence of such

Andrew and M Jeanne Stone.

wise stated.

specification, the response will be deemed to refer to both

of Justice" or "Internal Revenue Service", such terms include

any employee thereof during the time span to which such

interrogatory is directed, unless otherwise stated. The

term "Department of Justice" includes the United States

Attorney's office and any employee thereof during the time

span to which such interrogatory is directed, unless other-

D. Where an interrogatory uses the term "Department

- E. The use of the term "investigation" includes "audit." Unless otherwise stated in a response, a response to an "investigation will deem to include an "audit."
- 1. When did the Internal Revenue Service commence its investigation of the civil income tax liabilities of Andrew and M. Jeanne Stone for each of the years 1963 through 1967 ?
- 2. What facts caused the initiation of the investigation set forth in Interrogatory 1.?
- 3. Did the investigation set forth in Interrogatory

  1. result in the issuance of a statutory notice of deficiency

  dated April 6, 1972, a copy of which is attached as Exhibit A.?
- 4. If the response to Interrogatory 3. is negative, state what was the disposition of such investigation.
- 5. If the response to Interrogatory 3. is negative, state when the investigation of the civil income tax liabilities of Andrew and M. Jeanne Stone for the years 1963 through 1967 resulting in the issuance of the statutory notice of deficiency, dated April 6, 1972, was commenced.
- 6. If the response to Interrogatory 3. is negative, state what facts caused the initiation of the investigation of Andrew and M. Jeanne Stone which resulted in the issuance of the statutory notice of deficiency, dated April 6, 1972.
- 7. State the name, present position and current post of duty of each and every individual employed by the Internal Revenue Service who participated, either directly

or in a supervisory or advisory capacity, in the investigation of the Andrew and M. Jeanne Stone's income tax liability for each of the years 1963 through 1967, which investigation resulted in the issuance of the stautory notice of deficiency, dated April 6, 1972.

- 8. At the time of the commencement of the investigation of the income tax liabilities of Andrew and M. Jeanne Stone for the years 1963 through 1967, which resulted in the issuance of the statutory notice of deficiency, dated April 6, 1972, was the Internal Revenue Service aware of the existence of an Escrow Agreement dated July 24, 1970, by and between Andrew Stone, the United States of America and the St. Louis Union Trust Company? A copy of said Escrow Agreement is attached as Exhibit B.
- 9. If the response to Interrogatory 8. is affirmative, how did the Internal Revenue Service first become aware of the existence of such agreement?
- 10. If the response to Interrogatory 8. is negative, state when and how the Internal Revenue Service first discovered the existence of the agreement attached as Exhibit B.
- 11. When did the Internal Revenue Service become aware of the contents of the agreement, attached as Exhibit B, with particular reference to numbered paragraph 7. therein?
- 12. State the name and present post of duty of the individual and/or individuals in the Internal Revenue Service who first proposed the making of a jeopardy assessment against Andrew and M. Jeanne Stone for the years 1963 through 1967.

- 13. State with particularity each and every fact which caused such individual or individuals set forth in Interrogatory 12. to propose the making of a jeopardy assessment against Andrew and M. Jeanne Stone for the years 1963 through 1967.
- 14. State the name, present position and current post of duty of each and every individual employed by the Internal Revenue Service who participated, either directly or in a supervisory or advisory capacity, in the approval of the jeopardy assessment against Andrew and M. Jeanne Stone for the years 1963: through 1967.
- 15. Who, in the Internal Revenue Service, signed the ultimate authorization for making the jeopardy assessment against Andrew and M. Jeanne Stone for 1963 through 1967?
- 16. If the individual stated in Interrogatory 15.

  was not the District Director of Interna: Revenue in the district in which the jeopardy assessment was made, state the date and contents of the delegation order authorizing such individual to make the jeopardy assessment against Andrew and M. Jeanne Stone for the years 1963 through 1967.
- 17. Section 5214.21 of the Internal Revenue Manual sets forth the following procedural conditions as a guide for making jeopardy assessments:

- "(a) The taxpayer is or appears to be designing quickly to place his property beyond the reach of the Government either by removing it from the United States, or by concealing it, or by transferring it to other persons, or by dissipating it.
- (b) The taxpayer is, or appears to be designing quickly to depart from the United States, or to conceal himself.
- (c) The taxpayer's financial solvency is or appears to be imperiled. (This does not include cases where the taxpayer becomes insolvent by virtue of the accrual of the proposed assessment of tax, penalty and interest.)"

State which of the above conditions the District Director or his duly authorized delegate deemed were applicable to the jeopardy assessment made against Andrew and M. Jeanne Stone for 1963 through 1967.

- 18. For each condition deemed to have been met, as set forth in Interrogatory 17., state each and every fact considered by the Internal Revenue Service relevant to the applicability of such condition.
- Interrogatory 17. were used as the basis for said jeopardy assessment against Andrew and M. Jeanne Stone, state in the detail/basis for, and each and every fact considered and used as the basis for said jeopardy assessment.
- 20. When and where was the jeopardy assessment made against Andrew and M. Jeanne Stone for the years 1963 through 1967?
- 21. Was the Commissioner of Internal Revenue, at the time on the jeopardy assessment was made against Andrew

and M. Jeanne Stone for the years 1963 through 1967, apprised of the proposed issuance of the jeopardy assessment? If so, who apprised him and why was the Commissioner of Internal Revenue so informed?

- 22. Has the Internal Revenue Service classified or in any way noted that the Andrew and M. Jeanne Stone case involving the years 1963 through 1967 was considered sensitive or special case?
- 23. If the response to Interrogatory 22. is affirmative, state when such determination to classify the case as sensitive or special was made, by whom it was made, and why it was made.
- 24. If the response to Interrogatory 22. is affirmative, state the name of each and every individual, and present post of duty of each such individual, who has written a sensitive or special case memorandum, and the date of each such memorandum.
- 25 When was the Department of Justice first informed of the intention of the Internal Revenue to make a
  jeopardy assessment against Andrew and M Jeanne Stone
  for the years 1963 through 1967?
- 26. With respect to your response to Interrogatory 25. state (a) the name, position and post of duty of the individual so informed in the Department of Justice, (b) the name, position and post of duty of the individual in the Internal Revenue Service who conveyed such information to the Department of Justice, (c) how such information was

conveyed, if by written communication, the date of such communication, and (d) the substance of such information. 27. When did the Department of Justice first commence to attempt to dissuade the Internal Revenue Service from making a jeopardy assessment against indrew and M. Jeanne Stone for the years 1963 through 1967? With respect to your response to Interrogatory 27., state with particularity the nature and substance of the initial effort made by the Department of Justice to dissuade the Internal Revenue Service from making a jeopardy assessment -gainst Andrew and M. Jeanne Stone for the years 1963 through 1967 and who made such effort. 29. State with particularity each and every other effort made by the Department of Justice to dissuade the Internal Revenue Service from making a jeopardy assessment against Andrew and M. Jeanne Stone for the years 1963 through 1967, including the names of each employee making such other effort, the individual in the Internal Revenue Service contacted and the dates of such contact. 30. When and by what method was the Department of Justice advised that a jeopardy assessment had been made against Andrew and M Jeanne Stone for the years 1963 through 1967? 31. With respect to your response to Interrogatory 30. who was so advised in the Department of Justice? 32. State with particularity each and every reason why the Internal Revenue Service refused to be dissuaded by

the Department of Justice from making a jeopardy assessment against Andrew and M. Jeanne Stone for the years 1963 through 1967.

- 33. State with particularity each and every effort made by the Department of Justice to dissuade the Internal Revenue Service from serving Notices of Lien and Levy against the property and assets of Andrew and M. Jeanne Stone.
- 34. With respect to your response to Interrogatory 33., state the name and present post of duty of each and every employee of the Department of Justice who was directly or in a supervisory or advisory capacity involved in each such effort.
- 35. With respect to your response to Interrogatory 33., state the name and present post of duty of each and every employee of the Internal Revenue Service directly or in a supervisory or advisory capacity means involved in such efforts by the Department of Justice.
- 36. With respect to your response to Interrogatory
  33., state the date of each and every piece of correspondence
  relevant to the efforts of the Department of Justice to
  dissuade the Internal Revenue Service from serving such
  Notices of Lien and Levy, the originator of such correspondence
  and the addressee.
- 37. Does the Department of Justice believe it fully complied with the terms of the Escrow Agreement of

July 24, 1970, a copy of which is attached hereto as Exhibit B? If so, state with particularity how it has so complied?

- 38. State each and every reason why the Internal Revenue Service refused to be dissuaded by the Department of Justice from serving Notices of Lien and Levy upon the assets of Andrew and M. Jeanne Stone.
- 39. State whether a Notice of Lien and/or Notice of Levy was served upon the St. Louis Union Trust Company to stop distributions of income to Andrew Stone which he was receiving pursuant to the Escrow Agreement, attached hereto as Exhibit B.
- 40. With respect to your response to Interrogatory 39., state the date of service of such Notice of Lien and/or Notice of Levy and the individual upon whom such Notice of Lien and/or Notice of Levy was served.
- 41. With respect to your response to Interrogatory 39., state whether the Department of Justice was advised of the Notice of Lien and/or Notice of Levy served upon the St. Louis Union Trust Company. If so, how was the Department of Justice advised?
- A2. State whether any Notices of Lien and/or Notices of Levy were served upon any person other than the St. Louis Union Trust Company, pursuant to the jeopardy assessment made against Andrew and M. Jeanne Stone for the years 1963 through 1967, the name and address of each person accepting service and the date of such service.

television or radio contacted the Internal Revenue Service regarding Andrew and M. Jeanne Stone. 44. If your response to Interrogatory 43. is affirmative, state the name of such member of the press, television or radio who made such inquiry, the affiliation of such individual, and the date and nature of the inquiry. 45. If your response to Interrogatory 43. is affirmative, state the substance of each response given by the Internal Revenue Service to each inquiry, the date of such response, the name of the employee, and his or her present post of duty, making the response on behalf of the Internal Revenue Service and the employee of the Internal Revenue Service who authorized such response to be given. 46. If the response to Interrogatory 43. is negative, state whether any employee of the Internal Revenue Service, who was involved directly or in a supervisory or advisory capacity in the approval of the jeopardy assessment, was aware at the time of the approval of the jeopardy assessment, of any article in the news media concerning Andrew and M. Jeanne Stone. 47. If the response to Interrogatory 46. is affirmative, state the date of the article, the newspaper which published the article and the name of the individual in the Internal Revenue Service who was aware of such article. 48. State whether the legal or administrative files concerning the income tax liabilities of Andrew and M. Jeanne Stone for 1963 through 1967 in the possession of

the Internal Revenue Service or Department of Justice contain any newspaper articles regarding Andrew and M. Jeanne Stone. If so, state the date of such article and the newspaper so publishing such article.

WAGMAN, CANNON & MUSOFF, P.C.

Wallace Musoff

Counsel to Plaintiffs

136 East 57th Street

New York, N.Y. 10022

(Tel.) 212-753-2900

DATED: New York, N Y. March 17, 1975

## STIPULATION AND ORDER

WGB: am 74-2677 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ANDREW L. STONE and M. JEANNE STONE,

Plaintiffs

-V-

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STIPULATION & ORDER 74 Civ. 3643 (LW)

UNITED STATES OF AMERICA and DISTRICT DIRECTOR OF INTERNAL REVENUE, MAJGIATTAN DISTRICT,

Defendants.

WHEREAS, there is now pending before the Court a motion by defendants to dismiss plaintiffs' complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted;

Now, therefore, IT IS HERRBY STIPULATED AND ACREED, by and between the undersigned that defendants' time to answer or object to the interrogatories of plaintiffs, dated March 17, 1975, is hereby extended from April 18, 1975 until thirty days after the date on which the Court files an opinion or order disposing of said motion to dismiss. Dated: New York, New York.

April 14, 1975

WAGMAN, CANNON & MUSOFF, P.C. Attorneys for Plaintiffs

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K Member of the Firm 136 East 57th Street

New York, New York 10022 Telephone: (212) 753-2900

SO ORDERED:

PAUL J. CURRAN

United States Attorney for the Southern District of New York Attorney for Defendants

Hy: WILLIAM C. BALLATHE Assistant United States Attorney One St. Andrews Plaza New York, New York 1000/ Telaphone: (212) /91-1975

## OPINION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ANDREW L. STONE and M. JEANNE STONE,

Plaintiffs, :

-against-

: 74 Civil 3643

UNITED STATES OF AMERICA and DISTRICT DIRECTOR OF INTERNAL REVENUE, MANHATTAN DISTRICT,

OPINION

Defendants.

#43458

WACMAN, CANNON & MUSOFF, P.C. 136 East 57th Street New York, New York

Attorneys for Plaintiffs

WALLACE MUSOFF, ESQ. Of Counsel

PAUL J. CURRAN, ESQ.
United States Attorney for the
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New York, New York

Attorney for Defendants

WILLIAM G. BALLAINE, ESQ. Assistant United States Attorney Of Counsel EDWARD WEINFELD, D. J.

Plaintiffs, Andrew L. Stone and M. Jeanne
Stone, husband and wife, commenced this action against
the United States of America and the District Director
of Internal Revenue for a judgment (1) enjoining the defendants from enforcing, by lien, levy or otherwise, a
jeopardy assessment made against plaintiffs for income
deficiencies, interest and penalties totalling \$7,108,861.73
for the taxable years 1963 through 1967; (2) directing
specific enforcement of an escrow agreement dated July 24,
1970, by causing the release to plaintiff Andrew L. Stone
of income from escrow assets which has not been paid to
Stone by reason of defendants' enforcement of the jeopardy
assessment; and (3) awarding damages in the sum of \$10,000
in favor of plaintiff Andrew L. Stone for breach of the
escrow agreement.

The matter is now before the court on defendants' motion to dismiss the complaint pursuant to Rules 12(b)(2) and (b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted.

In 1968 Andrew L. Stone, who was the principal stockholder and chief executive officer of a corporation engaged in the production of rocket launchers pursuant to contracts with the Department of the Navy, was indicted in the United States District Court for the District of Columbia. The thirty-count indictment charged him, the corporation, Francis N. Rosenbaum (its special counsel and a director) and others with conspiracy and substantive crimes to defraud the government through the presentation of false and fictitious invoices and statements and the receipt of kickbacks. Stone pleaded guilty to the conspiracy count and seven substantive counts. Rosenbaum also pleaded guilty to the conspiracy charge, as well as other counts.

In 1969 plaintiff Stone was again indicted with others in the United States District Court for the Eastern District of Missouri and charged with violations of and conspiracy to violate the Munitions Control Act by exporting arms, ammunition and implements of war without government approval and by the use of false statements. He was convicted upon his plea of guilty to the crime of conspiracy.

In 1969 the government commenced two separate civil actions, one in the Eastern District of Missouri and the other in the District of Columbia, against Stone and

the corporations of which he was the principal shareholder, based in large measure upon the fraudulent and criminal acts committed by Stone and his co-conspirators. The complaints generally alleged various claims under the (1) (2) False Claims Act and the Anti-Kickback Act for breach of warranty, recoupment of public funds paid by mistake and declaration of a constructive trust. Damages were sought in the sum of over \$6,000,000 and double that amount for violation of the False Claims Act.

Thereafter, in an effort to assure that sufficient assets of Stone would be available to satisfy any judgment which the government might recover upon its civil claims and to avoid attachment by it against his property and assets, Stone and the government entered into an escrow agreement. Under its terms, pending the disposition of the civil suits, Stone deposited \$2,500,000 par value short term securities and the shares of a wholly owned corporation in escrow with the Trustee named in the agreement. The securities constituted some but not all of his assets.

<sup>(1) 31</sup> U.S.C. §§ 231-35.

<sup>(2) 41</sup> U.S.C. §§ 51-54.

received by the Trustee upon the securities was to be credited to Stone's account with the Trustee. It is this provision which plaintiffs seek to have specifically enforced, among other relief.

In addition to the two government civil actions, four separate civil actions by individual plaintiffs were commenced in United States district courts against Stone and others associated with him, alleging securities law violations based generally upon the fraudulent conduct which was the subject of the criminal charges. Those six actions were transferred to the District of Columbia for coordinated or consolidated pretrial proceedings pursuant (3) to 28 U.S.C., section 1407. In addition to the transferred actions, other civil suits against Stone were commenced in various state courts.

It is against this background that on February

7. 1972 the Internal Revenue Service made the jeopardy

assessment against Stone and his wife for income tax

deficiencies for the tax years 1963 through 1967. Notice

with a schedule detailing the computation of the deficiencies

<sup>(3)</sup> In re Alsco-Harvard Fraud Litigation, 325 F. Supp. 315 (J.P.M.L. 1971).

**JA96** 

and additions for fraud was duly sent to plaintiffs (5) within sixty days of the making of such assessment.

In July 1972 each filed a petition in the United States

Tax Court seeking a redetermination of the deficiencies (6) and additions assessed. Plaintiff M. Jeanne Stone in that proceeding contends she is an "innocent spouse" and (7) as such is not liable for any alleged deficiency.

Court proceeding, which is at issue and undetermined,

plaintiffs commenced this action. In their amended complaint they allege five separate claims for relief:

(1) that the United States breached the escrow agreement

by filing the jeopardy assessment against the plaintiffs,

thereby causing the escrow agent to withhold from Andrew

(8)

Stone the income derived from escrow assets;

(2) that

<sup>(4)</sup> See 26 U.S.C. § 6653(b).

<sup>(5)</sup> See 26 U.S.C. § 6861(b). There is no contention that the notice procedure required under this provision was not complied with by the Service.

<sup>(6)</sup> See 26 U.S.C. § 6213(a).

<sup>(7)</sup> See 26 U.S.C. § 6013(e).

<sup>(8)</sup> While the amounts withheld are substantially in excess of \$10,000, plaintiffs' prayer for relief is limited to \$10,000 in light of the limitations of the Tucker Act, 28 U.S.C. § 1346.

the jeopardy assessment was made arbitrarily, in bad faith, and in violation of the Internal Revenue Service's own guidelines in order to bring pressure against Andrew L. Stone, then incarcerated upon the criminal charges, to settle the civil actions brought by the government, rather than to safeguard any revenue that might be due and owing to the government; (3) that the jeopardy assessment was arbitrary and capricious and made in violation of plaintiffs' right against unreasonable seizures under the Fourth Amendment and of their due process rights under the Fifth Amendment: (4) that the computations underlying the assessment were made arbitrarily and in violation of the due process clause of the Fifth Amendment; and (5) that plaintiff M. Jeanne Stone is an innocent spouse who is entitled to be relieved of the tax deficiency assessment. Plaintiffs allege jurisdiction under 28 U.S.C., sections 1331, 1340 and 1345(a)(2).

The essence of plaintiffs' various claims,
however phrased, is that the jeopardy assessment was imposed arbitrarily and capriciously and not to collect taxes
that were due. The government, in support of its motion to
dismiss, contends that this court is without jurisdiction

since 26 U.S.C., section 7421(a), insofar as pertinent, provides:

restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person as the person against whom such cax was assessed."

The essential purpose of this anti-injunction provision

is to enable the government to assess and collect taxes

allegedly due as expeditiously as possible without judi
cial intervention. Those challenging a deficiency assess
ment may litigate its legality either by petition to the

(9)

Tax Court (which, as noted, plaintiffs here have sub
mitted) or, upon payment of the tax and denial of a re
fund, by a refund action in the federal district court,

(10)

or by asserting a claim in the Court of Claims.

Despite the absolute jurisdictional bar of section 7421(a), the Supreme Court, in Enochs v. Williams

(12)

Packing & Navigation Company, held that a suit for

<sup>(9) 26</sup> U.S.C. §§ 6212, 6213.

<sup>(10) 26</sup> U.S.C. § 7422; 28 U.S.C. § 1346.

<sup>(11) 28</sup> U.S.C. § 1491.

<sup>(12) 370</sup> U.S. 1 (1961).

injunctive relief against tax assessment or collection may be maintained where, on the basis of information available to the government at the time of the suit and under the most liberal view of the law and the facts,

(1) "it is clear that under no direconstances could the Government ultimately prevail" and (2) "equity jurisdiction otherwise exists" because of irreparable injury and lack (13) of an adequate remedy at law. Unless both conditions are met, the court is without jurisdiction and a suit for preventive injunctive relief must be dismissed.

(14)

reiterated the stringent force of the anti-injunction standards of Williams Packing, which it described as "the capstone to judicial construction of the Act," by refusing to engraft further exceptions based upon claims of alleged irreparable injury pending resort to alternative remedies and alleged denial of due process by reason

<sup>(13) 370</sup> U.S. at 7.

<sup>(14)</sup> United States v. American Friends Serv. Comm, 419 U.S. 7 (1974); Bob Jones Univ. v. Simon, 416 U.S. 725 (1974); Alexander v. "Americans United" Inc., 416 U.S. 752 (1974).

<sup>(15)</sup> Bob Jones, 416 U.S. at 742.

to warrant injunctive relief only upon a showing "that the Service's action is plainly without a legal basis," and (16) that it has "no chance of success on the merits."

Thus, plaintiffs have a heavy burden to sustain their claim for judicial intervention with respect to the challenged jeopardy assessment.

exceptions of <u>Williams Packing</u>, the plaintiffs in substance contend that the jeopardy assessment was made arbitrarily and capriciously by the Internal Revenue Service for punitive purposes and in the guise of a tax which it knew was not due; that the same items of income attributed to plaintiff Andrew L. Stone were attributed to his co-conspirator Francis M. Rosenbaum; that the purpose of the jeopardy assessment was not to collect or preserve the revenue, but to pressure plaintiffs into settling the civil actions, in violation of the escrew agreement; and that the assessment was imposed to satisfy the press, which had been questioning why plaintiff Andrew L. Stone, then serving a prison term upon his convictions, was permitted to receive

<sup>(16)</sup> Bob Jones, 416 U.S. at 745.

the income from the escrow assets. Plaintiffs further charge that as the net result of this alleged conduct by the Service they have been denuded of their assets and unconstitutionally decrived of their property and the means to resist the Service's deficiency assessment, or to defend the numerous other litigations in which Stone is named as a defendant. Accordingly they claim they have satisfied both standards of the Williams Packing jurisdictional test.

charges of "arbitrary and capricious" conduct attributed to the Service must be tested against the Williams Packing requirement that it must be "clear that under no circumstances could the government ultimately prevail." While plaintiffs contend that the assessment was inspired by base motives on the part of the Service, unrelated to taxes that were due, the deficiency letermination was not drawn out of thin air. Noth the criminal and civil damage actions furnish a substantial foundation to support the claim for additional taxes beyond those reported by plaintiffs in their tax returns for the years in question. The criminal charges involved inflated or fictitious invoices,

false purchase orders for component parts of rocket launchers, fictitious service kickbacks, dummy corporations and the use of foreign names to conceal the deposit in Swiss bank accounts of funds fraudulently obtained. The government's contention is that the amounts of which it was defrauded were diverted by Andrew Stone to his personal use and constituted income attributable to him by way of constructive dividends, which, together with items that were disallowed in the tax returns, reflected additional income of \$6,835,790 upon which taxes were due. According to the District of Columbia indictment, the total of the rocket launcher contracts awarded to the corporation headed by Stone and of which he was the principal shareholder exceeded \$47,000,000. The amounts diverted thereon by the fraudulent practices in the period from July 1963 to March 1, 1966, were alleged to have exceeded \$4,000,000, which does not include interest and tax penalties. The amount of the tax deficiencies as claimed by the Internal Revenue Service is \$4,739,241.14, and the addition for fraud is \$2,369,620.59, a total in excess of \$7,000,000.

While this court is not called upon to pass upon the merits of the claim for additional taxes due or

plaintiffs' resistance therato, clearly it cannot be contended that the deficiency assessments are without (17) substance or were not made in good faith. In assessing the additional taxes, the Service made a computation for each year specifying each item of additional income and unallowable deductions upon which it claimed deficiency taxes were due.

The tax deficiency assessment is entirely independent of the government's claims in the civil actions
against Stone, wherein the government seeks to recover in
excess of \$6,000,000. The covenant in the escrow agreement related solely to that action and was entered into by
Stone to avoid attachment of his assets and property in

<sup>(17)</sup> Compare Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974); Willits v. Richardson, 497 F.7d 240 (5th Cir. 1974); Lucia v. United States, 474 F.2d 565, 573-75 (5th Cir. 1973); Pizzarello v. United States, 408 F.2d 579 (2d Cir.), cert. denied, 396 U.S. 986 (1969); Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966), with Iannelli v. Long, 487 F.2d 317 (3d Cir.), cert. denied, 414 U.S. 1040 (1973); Westgate-California Corp. v. United States, 496 F.2d 839 (9th Cir. 1974); Cole v. Cardoza, 441 F.2d 1337 (6th Cir. 1971); Collins v. Daly, 437 F.2d 736 (7th Cir. 1971); Williams v. Wiseman, 333 F.2d 810 (10th Cir. 1964); Vuin v. Burton, 327 F.2d 967 (6th Cir. 1964); Botta v. Scanlon, 314 F.2d 392 (2d Cir. 1963); Hamilton v. United States, 309 F. Supp. 468, 472-73 (S.D.N.Y. 1969), aff'd, 429 F.2d (2d Cir. 1970), cert. denied, 401 U.S. 913 (1971).

that action. While the agreement provides that the dividend income of the ascrowed securities is to be credited to plaintiff Andrew L. Stone and that the Civil Division of the United States Department of Justice will not institute attachment proceedings against his property and assets and will use its best efforts to dissuade any other agency of the United States from proceeding by way of attachment or other lien against his property, this, of course, did not immunize Stone from tax liability or foreclose the Internal Revenue Service from taking aporopriate steps to assess a deficiency and to make a jeopardy assessment to reach his assets, including the income from the escrowed securities. The deficiency tax claims and the jeopardy remedies available to the Internal Revenue Service were entirely separate from the claims and remedies which the Justice Department was asserting under the False Claims and Anti-Kickback Acts.

plaintiffs also urge that the assessment was illegal because the District Director did not entertain a good faith belief that collection of the taxes would be jeopardized by delay, but rather acted to coerce plaintiffs into a settlement of the civil actions or to respond to a

clamorous public press. A good faith belief that tax collection is in jeopardy, plaintiffs argue, is required under section 6861(a) of the Internal Revenue Code, and in its absence the assessment is illegal. This claim, which plaintiffs centend is not subject to the rigid limitations of the Williams Packing doctrine because of express exceptions in sections 7421(a) and 6213(a), is, without passing upon their contention, also without merit. The District Director had the right, and indeed the duty, to protect the public fisc against dalay in the payment of the alleged additional taxes, collection of which might well

<sup>(18)</sup> Section 7421(a) bars suits for the purpose of restraining the assessment or collection of any tax "[e]xcept as provided in sectio[n] 6213(a) . . . " Section 6213(a) forbids any assessment upon United States taxpayers for a 90-day period following the mailing of a deficiency notice, and, if the taxpayer files a petition for radetermination with the Tax Court within those 90 days, the prohibition upon assessments continues until a final decision of the Tax Court. If the Service does attempt to assess or levy upon a tax deficiency within the prohibited period the protection of the Anti-Injunction Act is withdrawn; the last sentence of section 6213(a) provides that in such event, "[n] otwithstanding the provisions of section 7421(a)," the assessment, lavy, or other proceeding "may be enjoined by a proceeding in the proper court." An express exception is made, however, for jeopardy assessments under section 6861. Petitioners here, by arguing that the Service did not entertain a good faith belief that the collection of additional taxes was in jeopardy, take the position that the assessments were not made in compliance with section 6861(a) and that section 6213(a) therefore permits this court to issue an injunction.

have been jeopardized by the prospect of judgments in favor of third parties in the various pending civil actions against Stone. The broad discretion vested in the District Director to make a jeopardy assessment where he believes that the ultimate collection of the tax will be jeopardized by delay must be viewed against plaintiff Andrew L. Stone's entire course of fraudulent conduct with respect to the government contracts over an extended period and his use of Swiss bank accounts to conceal his derelictions. So viewed, it cannot be said that the assessment is wholly without foundation in fact. To contend, under the facts here presented, that the District Director's concern for the collection of a potential deficiency of \$7,000,000 was feigned borders on the fatuous. Even assuming that the jeopardy assessments were made, as plaintiffs contend, to coerce them into a settlement of the civil actions or in response to a clamorous public press, the assessments would still rest on an independent solid basis. In any case, the clear weight of the judicial authority is to the effect that the District Director's determination of a jeopardy is

<sup>(19)</sup> Cf. Bob Jones Univ. v. Simon, 416 U.S. 725, 740 (1974); Tannelli v. Long, 487 F.2d 317, 318 (3d Cir.), cert. denied, 414 U.S. 1040 (1973).

(20)

not subject to judicial review.

The plaintiffs' claim to injunctive jurisdicdiction also founders on the issue of alleged irreparable injury based upon their contention that the jeopardy assessment "stripped them of their liquid assets and [they] are unable to defend themselves against an onslaught of litigation by the United States involving millions of dollars and consequently face complete financial ruin." The short answer is that the Supreme Court explicitly has held that the Anci-Injunction Act may not be evaded "merely because collection would cause an irreparable injury, such as the ruination of Plaintiffs' attempt to hold the taxpayer's enterprise." on to jurisdiction by bootstrapping this claim to one of denial of due process of law under the Fifth Amendment and violation of their rights against unlawful seizures is equally unavailing. The Supreme Court has stated that

<sup>(20)</sup> See, e.g., Durovic v. Commissioner, 487 F.2d 40 (7th Cir. 1973), cert. denied, 417 U.S. 919 (1974); Transport Mfg. & Equip. Co. v. Trainor, 382 F.2d 793, 799 (8th Cir. 1967); Lloyd v. Patterson, 242 F.2d 742, 744 (5th Cir. 1957). But see Sherman v. Nash, 488 F.2d 1081, 1084 (3d Cir. 1973).

<sup>(21)</sup> Enochs v. Williams Packing Co., 370 U.S. 1, 6 (1962).

Accord, Bob Jones Univ. v. Simon, 416 U.S. 725, 742 (1974).

"decisions of this Court make it unmistakably clear that
the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence
(22)
under the Anti-Injunction Act." A similar due process
of law argument, based upon irreparable injury pending resort to alternative and allegedly inadequate judicial procedures for review was "dismissed out of hand . . . nearly
60 years ago" by the Supreme Court, which recently found
(23)
"such arguments no more compelling now than then."

so, too, the fact that the wife alleges she is

an "innocent spouse" affords no jurisdictional basis for
(24)

her claim. She filed a joint tax return with her hus(25)

band and is jointly and severally liable for any tax due.

Accordingly, she, too, is barred from maintaining this suit

under section 7421(a). The fact that she may ultimately

prevail upon her contention creates no exception thereunder.

<sup>(22)</sup> Alexander v. "Americans United" Inc., 416 U.S. 752, 759 (1964).

<sup>(23)</sup> Bob Jones Univ. v. Simon, 416 U.S. 725, 746 (1974). <u>See</u> Dodge v. Osborn, 240 U.S. 118, 122 (1916).

<sup>(24)</sup> See Kirtley v. Bickerstaff, 488 F.2d 768, 770 (10th Cir. 1973), cert. denied, 419 U.S. 828 (1974).

<sup>(25) 26</sup> U.S.C. § 6013 (d) (3).

Plaintiffs advance a number of other contentions which require no more than mention and may readily be disposed of. As to the claim that the Service attributed the same income to Francis Rosenbaum, Stone's co-conspirator, it is settled that, pending collection of the taxes alleged to be due, the Service is permitted to assert inconsistent positions and to assess deficiencies against more than one person for the same tax liability if there is an accepted (26) legal basis for each assertion.

Finally, plaintiffs contend that the jeopardy

assessments were made in violation of the Internal Revenue
(27)

Service's self-promulgated guidelines. Even were it

<sup>(26)</sup> Weils v. Commissioner, 499 F.2d 255, 259 (10th Cir.), cert. denied, 419 U.S. 966 (1974); Estate of Goodall v. Commissioner, 391 F.2d 775, 782-84 (8th Cir.), cert. denied, 393 U.S. 829 (1968).

<sup>(27)</sup> Internal Revenue Manual § 5214.21 provides for a jeopardy assessment where, inter alia:

<sup>&</sup>quot;(a) The tampayer is or appears to be designing quickly to place his property beyond the reach of the Government either by removing it from the United States, or by concealing it, or by transferring it to other persons, or by dissipating it.

<sup>&</sup>quot;(b) The taxpayer is, or appears to be designing quickly to depart from the United States, or to conceal himself.

<sup>&</sup>quot;(c) The taxpayer's financial solvency is or appears to be imperiled. (This does not include cases where the taxpayer becomes insolvent by virtue of the accrual of the proposed assessment of tax, penalty and interest.)"

to be accepted that the District Director did not follow the Service's guidelines, this would not vest the district court with jurisdiction to issue an injunction, contrary to the specific prohibition contained in the Anti-Injunction Act, which manifests a strong congressional policy against judicial intervention.

tion. The dismissal also applies to the claim alleged to be for breach of contract, since the prayer for specific performance of the agreement affects the assessment or collection of taxes. However, the dismissal of that claim is without prejudice to the commencement by plaintiffs of a new action for breach of contract against the government (not against the District Director) in the sum of \$10,000, or alternatively, with leave to plaintiffs, if so advised, to serve an amended complaint against the government in this action limited to a claim solely for breach of the alleged agreement in the sum of \$10,000.

Dated: New York, N. Y.
December 2, 1975

EDWARD WEINFELD
United States District Judge

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ANDREW L. STONE and M. JEANNE STONE,

Plaintiffs,

74 Civ. 3643 EW

v.

UNITED STATES OF AMERICA and DISTRICT DIRECTOR OF INTERNAL REVENUE, MANHATTAN DISTRICT,

Defendants.

WHEREAS, the Honorable Edward Weinfeld, United States
District Judge, Southern District of New York, issued an Opinion
in the captioned case on December 2, 1975 which provides in part:

The complaint is dismissed for lack of jurisdiction. The dismissal also applies to the claim alleged to be for breach of contract, since the prayer for specific performance of the agreement affects the assessment or collection of taxes. However, the dismissal of that claim is without prejudice to the commencement by plaintiffs of a new action for breach of contract against the government (not against the District Director) in the sum of \$10,000, or alternatively, with leave to plaintiffs, if so advised, to serve an amended complaint against the government in this action limited to a claim solely for breach of the alleged agreement in the sum of \$10,000.

NOW COMES Andrew L. Stone and M. Jeanne Stone, through their counsel, and pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedures (28 USCA), and without prejudice to the rights of the plaintiffs to bring an action de novo against the United States of America for breach of contract, hereby dismisses the captioned suit, insofar as an amended complaint may be filed.

Dated: January 29, 1976 New York, New York WAGMAN, CANNON & MUSOFF, P.C. 136 East 57th Street New York, New York Tel: (212) 753-2900

Attorneys for plaintiffs

Barry D. Gordon

No. 31 - 0418950 Qualitied in New York County Commission Expires March 30, 1977

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